Supreme Court of the United States

October Term, 1944. — No. 666

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA

Petitioner

against

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, WITH BRIEF AND APPENDICES

JOSEPH O. CARSON,
CHARLES H. TUTTLE,
THOMAS E. KERWIN,
HUGH K. MCKEVITT,
Of Counsel for Petitioner.

CHARLES H. TUTTLE,
Attorney for Petitioner,
15 Broad Street,
New York City 5, N. Y.

SUBJECT INDEX

CASES CITED

STATUTES CITED

OTHER AUTHORITIES CITED

IN THE

Supreme Court of the United States

October Term, 1944. — No.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, WITH BRIEF AND APPENDICES

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The petition of the defendant, United Brotherhood of Carpenters and Joiners of America, respectfully shows:

Your petitioner seeks review of the judgment of the United States Circuit Court of Appeals for the Ninth Circuit, dated and filed August 23, 1944 (1697), pursuant to its opinion rendered August 23, 1944, affirming the judgment of the United States District Court for the North District of California, Southern Division (1366-8),

entered upon a verdict of guilty (1365) and based upon an indictment (4-37) charging this petitioner, among others, with violation of Section 1 of the Sherman Anti-Trust Act. (27).

The petitioner's application to the United States Circuit Court of Appeals for a rehearing was denied on October 14, 1944 (1698).

A copy of the Opinion of the Circuit Court of Appeals begins at page 1674 of the Record, and is reprinted as Appendix A hereto (p. 50, *post*). It is officially reported in 144 Fed. (2d) 546.

Summary and Short Statement of Matter Involved

The indictment, in the first instance, consisted of two counts; but, upon the Attorney General's motion at the outset of the trial the second count, charging a conspiracy to create a monopoly, was dismissed (111, 139).

The indictment charges that continuously since September 1, 1936, the defendants (composed of labor groups and manufacturing groups) conspired against Section 1 of the Sherman Act for the following "general purpose" and "object" (26-28):

> 1. To exclude manufacturers of millwork and patterned lumber located in states other than California from selling this material in, and from shipping it into, the San Francisco Bay Area.
>
> 2. To prevent lumber yards and jobbers in the Area from purchasing and bringing into the Area millwork and patterned lumber manufactured in states other than California.
>
> 3. To raise, fix, stabilize and maintain prices for millwork and patterned lumber shipped into California for sale in the Area.

On October 1, 1940, this petitioner and the other labor defendants demurred for insufficiency (42).

The demurrer was overruled on December 2, 1940 (103). Exception was taken (104) and constitutes an Assignment of Error (1592-3).

During the trial, this petitioner made the following motions:

1. A motion at the opening of the trial to dismiss the indictment for insufficiency (140).

2. A motion at the close of the prosecution's case to dismiss the indictment or for directed verdict, for insufficiency of evidence (596-7).

3. A like motion at the close of the whole case (1124-5).

4. Motions after verdict for a new trial and in arrest of judgment (1209, 1213, 1217).

These motions were all denied. Exceptions were taken and Assignments of Error filed (141, 598, 1125, 1221, 1393-5, 1606).

The affirmance by the Circuit Court of Appeals was unanimous.

Jurisdiction

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 28 U. S. C. A., Section 347 (a), and as affected by Rule 11 of the Criminal Appeals Rules.

Statutes Involved

The Statute alleged to have been violated is Section 1 of the Act of July 2, 1890, 26 Stat. 209, known as the Sherman Act, as amended by the Act of August 17, 1937, 50 Stat. 693, 15 U. S. C. A., Section 1. There are also involved the Clayton Act, 15 U. S. C. 17 and 29 U. S. C. 52, and the Norris-LaGuardia Act, 29 U. S. C. 102 *et seq.*

These statutes are reproduced in the Appendix to the petition and brief being submitted by the other labor defendants.

Brief Statement of Facts

(1) The indictment *does not charge* any extortion, racketeering, corruption, disorderly conduct, violence or threat of violence.

The indictment concedes the fact of "a labor dispute." It expressly alleges that the defendant unions had made "wage scale demands" upon the defendant manufacturers (28); that the unions had backed these demands by picketing (30, 38); and that the manufacturers of millwork and patterned lumber outside the Bay Area of San Francisco "have a lower wage scale than the millwork and patterned lumber manufacturers in the San Francisco Bay Area" (8).

The indictment further alleges that the union activity was local to the Bay Area and resulted in a local wage scale agreement with the defendant manufacturers local to the Bay Area (27-32, 36). The defendant unions were also all localized in the Bay Area with the exception of this petitioner which, in the indictment, is joined on the principle of imputation, to wit: "as advisor to, supervisor of, and governing body for carpenters' local unions and carpenters' district and state councils in the United States of America" (18).

In other words, the indictment sought to invoke the criminal law in order to equalize wages in this industry by bringing them down to the lowest existing standard, whereas the organized labor and the agreement attacked in the indictment sought to equalize wages by bringing them up to the highest existing standard.

(2) The testimony tells a consistent story of a continuous labor struggle in the Bay Area for several decades.

In 1921 the local employers had forced on the local employees an open shop, and they kept it open for fourteen years (829). Not until June 27, 1935, and after a two weeks strike, were the local unions again able to secure a closed shop agreement, but that agreement was terminable on sixty days notice by either side (754, 757). It was not signed by all the manufacturers in the Bay Area, and some non-union shops continued in operation (651, 758, 776, 831).

In consequence, in the spring of 1936 the controversy intensified itself again. An arbitration agreement was made and later revoked (605-10, 758-9, 763). On September 21, 1936, another closed shop agreement, stating a wage scale, was signed but was again terminable on sixty days notice by either side (279-287). This agreement soon broke down (834) and was followed by a new arbitration which resulted in a dispute as to the parties bound thereby (621, 772-3, 835-6). This dispute was ultimately compromised by the agreement dated October 17, 1938, which fixed a new and somewhat higher wage scale; but either side could terminate it after January 1, 1939 "upon notice" (290, 568, 629-630, 671, 773-4).

Obviously, these short term, revokable agreements were merely *truces* in a continuous labor dispute on three fronts, to wit: the front against all the employers in the Bay Area, the front against such of those employers as refused the concessions by the others, and the front

against non-union labor and non-union goods in and out of the Bay Area. The long-range view of the unions was to promote wages and unionization throughout the entire industry.

The agreement of 1936 (Ex. 132, p. 280) contained the following paragraph (283):

> "16. In the interest of standardization of rates of wages and working conditions, it is agreed that no material will be purchased from, and no work will be done on any material or articles that has had any operation performed on same by Saw Mills, Mills or Cabinet Shops, or their distributors that do not conform to the rates of wage and working conditions of this Agreement. The purchase of and the working of the following products is excepted: (Then follows a list of certain excepted articles.)
>
> Nothing herein is to be interpreted as prevening the entire production and sale of any articles in its completed state to any buyer. Nothing herein is to be interpreted as to in any way interfere with any business of the Federal Government, or that of an interstate common carrier, or any regulations of the Federal Trade Commission, or the Sherman Anti-Trust Laws."

A substantially similar provision, with similar exemptions and exceptions, was in the 1938 contract (Ex. 132, pp. 288-290).

This agreement does not classify articles according to geographical origin but according to wage scale and working conditions, *no matter where their origin.*

(3) At the trial the Court seemed to consider that these written contracts were *ipso facto* violations of Section 1 of the Sherman Act; and its charge to the jury was tantamount to a direction to convict.

It reduced the issue of guilt or innocence on the part of the union defendants to the single question (1153):

"The sole question is whether defendants intended to *or did* restrain the shipment of millwork and patterned lumber in interstate commerce pursuant to an understanding between the labor union defendants and the non-labor defendants."

In the same breath, the Trial Court ruled out as a qualification, excuse or defense on the part of the labor defendants any claim or proof that they were acting solely to protect their self-interest or their wage scale or working conditions, or to enforce their refusal to work on articles non-union made or not bearing the union label. The Court charged (1152):

"Though the motive of the labor union defendants was to protect their self-interest, you must find the defendants, or any of them, who so combined and conspired, guilty as charged."

The Trial Court also charged (1152):

"In this connection, I charge you that whether the millwork and patterned lumber involved in the testimony in this case was manufactured in mills whose employees were members of the United Brotherhood of Carpenters and Joiners of America or of its affiliated unions, or whether such millwork and patterned lumber bore a union label, is not to be considered by you."

The application of these binding instructions to the written agreements of 1936 and 1938 was both obvious and absolute. Indeed, the Trial Court made the application inescapable and positive by charging (1150):

"If you find that the employer and labor union defendants entered into an agreement or understanding, oral or written, under the terms of which the employer defendants agreed not to purchase patterned lumber and millwork manufactured under a lower wage scale than that prevailing in the San Francisco Bay Area, including patterned lumber and millwork

manufactured in states outside the State of California; such an agreement or understanding would constitute a violation of the Sherman Act as charged in the Indictment."

At the same time the Trial Court refused all requests by the labor defendants for instructions on the subject of the agreements with the employer defendants, and the purposes of the labor defendants in making and acting under those agreements (1175-82). Exceptions and Assignments of Error were entered (1128, 1155-60, 1441, 1591, 1598-9).

(4) The agreements of 1936 and 1938 were closed shop agreements,—the shops of the signatory manufacturers being thereby closed against both non-union labor and non-union materials made *anywhere*.

These agreements did not bar from the shops material merely because made outside the Bay Area or the State. The only articles barred were those made under less favorable wage scales or working conditions.

Such a closed shop has never before been held to be a violation of the Sherman Act,—notwithstanding that it does involve, as a consequence, some restraint or diminution of the freedom of trade and some effect upon costs and prices.

On the labor side, the very purpose of such an agreement is to protect or improve the scale of wages and hence the standard of living from the depressing competition of lower wages and lower standards of living, whether reflected in non-union services or in non-union goods. Such an agreement may well have some effect upon costs and prices in the area involved, either as making against a decline or as causing some increase. On the other hand, it may have the effect in the long run of improving wages and working conditions not only in the area involved but throughout the entire industry, and hence of increasing buying power and promoting trade everywhere. The

American idea is that the community receives its return in the greater purchasing power and cultural standards of the workmen.

But, under the law as charged by the Trial Court, such closed shop agreements are reduced to jury issues. A restraint of trade or a tendency to monopoly or an economic effect upon prices can always be claimed. Although the union may concededly be acting in its own interest and for its own ends, nevertheless under this charge to the jury any such interest or aim is outlawed by the simple argument that there was an agreement with a non-labor group and that this latter group also had in mind its own self-interest and a purpose to transmute its increased costs into increased prices. Obviously, such a view of the law converts every closed shop into a lawsuit and undermines the whole principle.

Nevertheless, the Circuit Court of Appeals has affirmed this charge to the jury and hence the conviction which inevitably ensued.

(5) As to this petitioner (United Brotherhood of Carpenters and Joiners of America), which was made a party to the indictment by imputation of guilt (18), the Trial Court merely told the jury that in determining the guilt or innocence of a labor union, the jury was to proceed by the same test as they would apply to a corporation, to wit: "an examination of the acts of their agents" (1138); and that (1137):

> "The act of an agent done for or on behalf of a corporation and within the scope of his authority, or an act which an agent has assumed to do for a corporation while performing duties actually delegated to him, is deemed to be the act of the corporation."

The Trial Court made no reference to the broad autonomy of local unions under the Constitution of the Brotherhood in the matter of government, laws, trade policies and rules, strikes and other union activities (461-2).

The Trial Court also refused all our requests for instructions as to the requirements for finding guilty participation by this petitioner. These requests are not mentioned in the opinion of the Circuit Court of Appeals.

In the Circuit Court of Appeals we challenged these instructions and refusals to instruct, on the following grounds:

(a) They erroneously applied to a criminal case the rule applicable in a civil case.

(b) Even in a civil case the alternative phrase was erroneous because it did not require that the act which the agent "assumed to do" must be found to fall within the scope of the "duties actually delegated to him".

(c) In a criminal case, guilt is personal and there is no such thing as guilt by mere imputation.

(d) Section 106 of the Norris-LaGuardia Act expressly exempts a labor union or organization from criminal responsibility by reason of the unlawful acts of an officer or agent "except upon clear proof of actual participation in, or actual authorization of, such acts, or ratification of such acts after actual knowledge thereof."

The Questions Presented

As to this petitioner the formal questions presented are:

1. Was a violation of Section 1 of the Sherman Act lawfully charged as to it?

2. Assuming that a violation of the statute was lawfully charged, was there sufficient evidence as to this petitioner upon which to submit the case to the jury and upon which to sustain a verdict of guilty?

3. Were prejudicial errors as to this petitioner committed in the course of the trial and during the charge?

4. Was the affirmance by the Circuit Court of Appeals based on sound principles of law?

Actually, however, there are involved in these formal questions certain far-reaching issues of law as to which many Federal courts are in sharp conflict with the decisions of the courts below, and which are of such general public importance and concern as to call for settlement by this Supreme Court.

Since the decision below, the Circuit Court of Appeals for the Second Circuit has rendered an opposite decision in a case far stronger for illegality, and has acknowledged the conflict.

The decision by the Court below was made August 23, 1944. On October 12, 1944, in the case of *Allen Bradley Co., et al.*, v. *Local Union No. 3, International Brotherhood of Electrical Workers, et al.*, the Circuit Court of Appeals for the Second Circuit (1) reversed a decree of the District Court of the United States for the Southern District of New York, which had enjoined activities of the defendant union as violative of Section 1 of the Sherman Act, and (2) dismissed the action on the merits. In doing so, the Circuit Court of Appeals rendered an opinion, a full copy of which is hereto annexed as Appendix B (p. 68, *post*).

In that opinion the Circuit Court of Appeals for the Second Circuit discussed the decision of the Circuit Court of Appeals for the Ninth Circuit in the instant case, and closed its discussion with these words (p. 88, *post*):

> "Nevertheless, with deference one may question the present extent of the *Brims* doctrine as here restated, or the view that a labor dispute loses its character as such as soon as a collective bargain is made. Compare the views of the same district judge in the *Bay Area Painters* case, *supra*."

The *Bay Area Painters* case thus referred to (to wit: *United States* v. *Bay Area Painters & Dec. Joint Com.*, D. C. N. D. Cal., 49 F. Supp. 733, 738) was a decision by the same Judge who tried the present case and was rendered after the verdict in the present case.

In its opinion in this *Allen Bradley Co.* case, the Circuit Court of Appeals for the Second Circuit made note of this subsequent decision by the Trial Judge in our case, and said concerning it (p. 87, *post*):

> "'See also *United States* v. *Bay Area Painters & Dec. Joint Com.*, D. C. N. D. Cal., 49 F. Supp. 733, 738, saying 'it would seem beyond belief' that Congress, having carefully protected the machinery of collective bargaining, would then after the bargain has been made withdraw that protection and leave the parties liable for prosecution for criminal conspiracy, and distinguishing *United States* v. *Lumber Products Ass'n*, D. C. N. D. Cal., 42 F. Supp. 910, affirmed in part, 9 Cir., Aug. 23, 1944, ——— F. 2d ———.'"

The following quotations from the opinion of the Circuit Court of Appeals for the Second Circuit in the *Allen Bradley Company* case will show how diametrically opposed it is both in principle and in application of principle to the decision of the Circuit Court of Appeals for the Ninth Circuit in the instant case:

(p. 72, *post*):

> "The findings then show that 'agreements and understandings' entered into by the three groups—manufacturers, contractors, and union—gave them a complete monopoly which they used to boycott the equipment manufactured by the plaintiffs.
>
> While the boycott as found ran the gamut of electrical equipment from highly complicated switchboards and control devices down to novelty lamp shades, the case of the modern switchboard is offered as typical. There are in New York City a number of companies manufacturing switchboards who, before these activities of Local 3, shared an open competitive market with many of plaintiffs. In return for a closed-shop agreement calling for higher wages and shorter hours for employees, however, Local 3 promised these local companies an exclusive market for switchboards within the city, so that they could name their own prices to

offset increased production costs. Local 3 carried out its promise with the help of the electrical contractors. It had already won closed-shop agreements from a vast majority of the latter through a series of strikes, threatened strikes, and sympathetic strikes by other unions in the building trade, which threatened to tie up all construction work in New York City. It now secured the further terms that union members should work only on switchboards of local manufacture by union shops, and that the contractors should have the sole power to buy materials for any job, with a proviso as additional protection that only products bearing the union label would be utilized. Like the manufacturers, the contractors were not averse to the extra expense of union material and labor, when all competition was thus removed from the field."

(p. 74, *post*):

"All in all, the situation disclosed by the findings is that of an entire industry in a local area, quite dominated and closed to outsiders by a powerful union, whose members receive as a result exceedingly higher wages, shorter working hours, and improved working conditions, and whose co-partners—the local manufacturers and contractors—also gain by the greater profits achieved through the stifling of competition."

(p. 75, *post*):

"Moreover, as must be expected in cases where a local area is thus closed to outside products, the persons injured will include not only the excluded manufacturers and rival unions, but also—at least initially and very likely continuously—the consuming public, which must pay higher rates (as, indeed, it must also for raising of wages and lowering of hours of work) and does not receive the benefits of improved machinery or methods of operation. Thus it appears that general electrical work and equipment are costly in New York City, and instances are cited where equipment of plaintiffs was turned down for local equipment with union label at twice or three times the cost. Since the lowest bidder no longer gets

> city contracts, if it be not a union bid, the city has lost federal grants, which were premised upon acceptance of the lowest bid. An outstanding example of the consequences from this type of economic warfare to third persons is that on local manufacturer which has two price lists for its products, one for union use within the city at more than twice the price of the other for use without the jurisdiction."

Judge Swan rested his dissent on an opposite interpretation of the *Brims* decision and of its applicability to-day in view of the later Norris-LaGuardia Act.

We are informed by counsel in this *Allen Bradley* case that a petition for a writ of certiorari is expected to be filed in the next two or three weeks.

Reasons Relied on for Granting of Writ of Certiorari

1. The question of the applicability of Section 1 of the Sherman Act to the union activities of this petitioner and of the other union defendants is of great public importance, wide application, and vital concern to organized labor and the country's economy.

2. The question of the applicability of the Norris-LaGuardia Act as immunizing such activities is of like critical importance.

3. The rulings of the Trial Court, affirmed by the Circuit Court of Appeals, involve questions of law which touch the most basic rights and relations of organized labor and of employers.

4. As demonstrated above, there is fundamental conflict between the Court below and the Circuit Court of Appeals for the Second Circuit as to these questions, the principles back of them, and the application thereof to given factual situations.

5. This conflict is also reflected in decisions by other federal courts, contradictory of the decisions below. The instances will be presented hereafter.

6. Much of this conflict arises from different and contradictory interpretations of *United States* v. *Brims*, 272 U. S. 549, decided in November, 1926, and from different and contradictory views as to the effect upon that decision of the subsequent Norris-LaGuardia Act and of subsequent decisions by this Supreme Court.

7. Much of this conflict also arises from different and contradictory interpretations of the limitation noted by Mr. Justice Frankfurter in *United States* v. *Hutcheson*, 312 U. S. 219, 232, that: "So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under § 20 (of the Clayton Act) are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means".

And also from the footnote which Mr. Justice Frankfurter appended thereto, to wit: "*Cf. United States* v. *Brims*, 272 U. S. 549, involving a conspiracy of mill work manufacturers, building contractors and union carpenters".

8. Involved in these questions is the further issue as to when and to what extent an agreement for a shop closed against non-union labor or non-union goods or both, may be licit or illicit, innocent or criminal.

9. Involved in these questions is the further issue raised by the decision of the Court below that where labor and non-labor groups have reached an agreement in settlement of a labor dispute, then "the dispute is past", and "the labor and non-labor groups are combined" and "no longer 'participating in or interested in a labor dis-

pute' as that term is used in § 5 of the Norris-LaGuardia Act", (p. 26, *post*).

Contrast this language and principle with (1) the fact that in this industry in the Bay Area continuous labor controversy has existed since 1921, and the agreements of 1935, 1936 and 1938 were and proved to be but short-term revocable *truces* therein, and (2) the further fact of the later declaration by the Circuit Court of Appeals in the *Allen Bradley Company* case, *supra*, that "with deference one may question * * * the view that a labor dispute loses its character as such as soon as a collective bargain is made" (p. 88, *post*).

10. Involved in these questions also is the further issue as to whether, in the event of an agreement between a labor and a non-labor group in settlement of a labor dispute, the immunity of the labor group by reason of acting in its own self-interest, is nullified by reason of the motives, objectives or subsequent acts of the non-labor group.

The Trial Court charged the jury that, in such case, "though the motive of the labor union defendants was to protect their self-interest", nevertheless that fact provided no immunity or defense (1152).

On the other hand, the Circuit Court of Appeals for the Second Circuit has just said in the *Allen Bradley Company* case, *supra*, that "the activities which cannot be forbidden to Local 3 acting by itself are not to be interdicted because other groups join with them to the same end" (p. 88, *post*). "The same end" in that case, as the opinion therein frankly acknowledged (p. 72, *post*), was that "in return for a closed-shop agreement calling for higher wages and shorter hours for employees, Local 3 promised these local companies an exclusive market for switchboards within the city so that they could name their own prices to offset increased production costs".

11. The Trial Court also charged the jury that whether the articles involved in the testimony were non-union made or did not bear a union label, "is not to be considered by you" (1152-3).

This charge, we submit, eliminated from recognition by the jury the most basic rights of union labor (p. 39, *post*.).

12. By eliminating as relevant to a defense the whole subject of the motive or purpose of the labor defendants "to promote their self-interest" (1152), and by its refusal of all the unions' requests for instructions on this subject (p. 26, *post*), the Trial Court withdrew from the jury all consideration of whether the Union's attitude towards the articles involved in the testimony was merely because of their origin outside the state or, on the contrary, was because they were made under inferior wage scales and working conditions or were non-union made or unlabeled.

13. The Trial Court also charged the jury starkly (1153):

> "The sole question is whether defendants intended to *or did* restrain the shipment of millwork and patterned lumber in interstate commerce pursuant to an understanding between the labor union defendants and the non-labor defendants."

Under this instruction, an agreement between the unions and the employers in a metropolitan locality for higher wages and a closed shop is illegal *per se*, because it is "an understanding" and hence a combination, and because it will restrict the freedom of trade and may increase prices in the locality (p. 19, *post*).

Obviously, such a view of the law jeopardizes the very life of trade unionism as "a social organism which must depend on united effort for its existence and upon at least certain restraints of trade as a reason for its being" (*Allen Bradley Company* case, p. 79, *post*).

14. The test which the Trial Court gave to the jury (1137-8) for imputing guilt to this petitioner (an international labor union with more than 350,000 members (18)) was erroneous even in a civil case (*Coronado Co.* v. *United Mine Workers*, 268 U. S. 259), and *à fortiori*, in a criminal case (pp. 42-9, *post*). It was also directly contrary to the test made mandatory by Section 106 of the Norris-LaGuardia Act.

This issue—the extent of the criminal liability of a national or international union for the act or acquiescence of one of its officers—is one of great public importance.

We submit that the decisions below reverse the law of this issue as heretofore established by decision and statute.

Dated: November 6th, 1944.

THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA,
Petitioner,

By JOSEPH O. CARSON,
CHARLES H. TUTTLE,
THOMAS E. KERWIN,
HUGH K. MCKEVITT,
Of Counsel

CHARLES H. TUTTLE,
Attorney for Petitioner,
and a member of the bar of this Court,
15 Broad Street,
New York City 5, N. Y.

I hereby certify that in my judgment the foregoing petition is well founded and that it is not interposed for delay.

Dated, November 6th, 1944.

CHARLES H. TUTTLE,
Of Counsel for Petitioner.

BRIEF AND APPENDICES

POINT I.

The basic position of the Circuit Court of Appeals that the agreement settling the labor dispute "split the take" by giving "the employer a monopoly price raising contract", was not the issue submitted to the jury, rests on principles which overturn an unchallenged body of judicial authority, and begs the fundamental question.

On the other hand, the Trial Court erroneously instructed the jury that the agreement constituted a combination between a labor and a non-labor group and hence had no immunity from the Clayton Act or the Norris-LaGuardia Act; and that it constituted a criminal offense against Section 1 of the Sherman Act if it was "intended to or did restrict" interstate commerce.

The Trial Court in effect directed a verdict of guilty.

(1) The construction placed by the Circuit Court of Appeals upon Count 1 of the indictment is revealed in the following sentence of its opinion distinguishing *United States v. Hutcheson*, 312 U. S. 219 (p. 58, *post*):

> "The situation [in the Hutcheson case] is strikingly different from one where the agreement between employers and unions for the exclusion of the articles from outside the State is purposed at once to raise prices by monopoly pricing and create an increased wage by such pricing."

The opinion of the Circuit Court of Appeals constantly refers to the agreement as one for "price control", and as giving the "employer a monopoly price raising contract", with the union and the employer agreeing to "split the take" (pp. 54, 55, 58, *post*).

But no such formulation or issue was submitted to the jury; and, moreover, the charge of attempting "monopoly" had been withdrawn at the outset of the trial by the Attorney General's act in dismissing the second count of the indictment which charged an offense against Section 2, of the Sherman Act (111, 139).

(2) The jury was at no time told that before it could convict the labor defendants it was bound to find that they "purposed at once to raise prices by monopoly pricing and create an increased wage by such pricing". On the contrary, the jury was expressly told that, although the raising of the price of millwork and patterned lumber in the Bay Area was one of the alleged "three objects" of the combination as charged in the indictment, it was not necessary, in order to convict, for them to find that price-raising was actually one of the objects, but that it would be sufficient to find any one of the other alleged "objects", to wit, restricting sales in the Bay Area by outside manufacturers or restricting purchases in the Bay Area from outside manufacturers. Said the Trial Court to the jury (p. 1140):

> "It is not incumbent upon the Government to prove that all three of the stated objects were sought or attained. Proof of one is sufficient."

As a result of this charge, there is now no way of knowing whether the jury found price-raising to be one of the alleged objects, as distinct from some restraint on interstate commerce. For all that appears the jury may have found that the objective of the labor group was the maintenance of a wage scale and a closed shop, rather than price-raising.

(3) Indeed, when the Trial Court came to put to the jury the ultimate acid test of guilt or innocence on the part of the labor defendants, it did not include price-

raising as a necessary objective on their part, but, on the contrary, proceeded on the predicate that an agreement between employees and employers in settlement of a labor dispute became a combination between a labor and non-labor group and derived no immunity from the fact that the labor group may have entered into it to promote their self-interest; and that, if the effect thereof was a restraint of interstate commerce, the labor defendants were criminally guilty under Section 1 of the Sherman Act.

In effect, the Trial Court charged as matter of law that a combination existed; that any motivation of self-interest on the part of the labor group was irrelevant; and that the only question was whether, by so combining, the labor group had in fact restrained the shipment of millwork and patterned lumber in interstate commerce (1152-3).

Thus, the Trial Court charged (p. 1152):

> "Labor unions or their members may join together in promoting their self-interest, even though their acts in so doing may result in an undue obstruction of interstate commerce. But they can do this only so long as they act in their self-interest and do not combine with non-labor groups."

The Trial Court also charged (1151-52):

> "It would constitute no defense under the law, either to the employer defendants or to the labor union defendants, that the combination and conspiracy may have been arrived at as the result of a settlement of a labor dispute; and it would likewise constitute no defense under the law that any such combination and conspiracy may have been arrived at as the result of proceedings in arbitration of such a dispute."

All this amounted to instructing the jury that a labor group could with immunity act together in an obstruction —indeed, "an undue obstruction"—of interstate commerce, provided they were "promoting their self-interest" in so doing; but that this immunity ended when their labor

dispute ended in an agreement with the employers. From that point on, there was a combination between the labor and the non-labor groups; and hence, charged the Trial Court, the test of innocence or guilt from that point on was as follows (1153):

> "The sole question is whether defendants intended to or did restrain the shipment of millwork and patterned lumber in interstate commerce pursuant to an understanding between the labor union defendants and the non-labor defendants."

This, we respectfully submit, amounted to a direction to convict, since the fact of an understanding between the labor and non-labor groups was established by agreements in writing, and since those agreements promoted the self-interest of the labor group by establishing shops closed against non-union labor and non-union goods, and thereby necessarily wrought some restriction upon the freedom of interstate commerce in services and goods.

(4) Hence we respectfully submit:

(a) The Circuit Court of Appeals begged the whole question by stating that it found in the evidence sufficient for a jury finding of a purpose on the part of the labor group "at once to raise prices by monopoly pricing and create an increased wage by such pricing" (p. 58, *post*).

(b) The Trial Court bound the jury to a view of the law which was different and utterly erroneous and compelled a conviction.

(5) Moreover, there was nothing at all in the agreements of 1936 and 1938 about prices or the increase thereof (280-3, 288-290).

The subject-matter of each agreement was a wage scale and working conditions, and the settlement of a labor dispute. The unions demanded that the employers exclude from their shops both non-union employees and

articles made under a less favorable wage scale and less favorable working conditions *no matter where made.*

Neither agreement stipulated for the exclusion of articles merely because made outside the Bay Area or the State of California.

The unions' immediate object was to secure and protect the ability of their own members to obtain and maintain employment at a wage scale consonant with an appropriate livelihood. Their long-view object was to raise wages throughout the entire industry *everywhere.*

To quote again Par. 16 of the agreement of September 21, 1936 (U. S. Ex. 132, pp. 282-8):

> "16. In the interests of standardization of rates of wages and working conditions, it is agreed that no material will be purchased from, and no work will be done on any material or articles that has had any operation performed on same by Saw Mills, Mills or Cabinet Shops, or their distributors that do not conform to the rates of wage and working conditions of this Agreement. The purchase of and the working of the following products is excepted:".

Not a word is said about prices or price control or the creation of a monopoly or a division of "a take". The employers were free to compete among themselves or with others, and to introduce into their shops material made anywhere in the United States provided it was made under rates of wages and working conditions as good or better than that in the agreements. Surely, as free men, the members of these unions had the right to refuse or refrain from working on materials made under conditions which they believed to be inimical to their interests or to the interests of organized labor generally in the field of carpentry; and if they had the right so to refuse or refrain, they had the right to make with employers an agreement which recognized such right to refuse or refrain and which embodied it in a settlement of the labor dispute caused by their assertion of that primary right, even

though as a consequence there was some restriction on the freedom of trade or some economic effect upon prices.

Indeed, the indictment itself recognizes that "wage scale demands" was the content of the unions' position, and alleges that the defendant manufacturers "agreed to accede and did accede" to such "wage scale demands" (par. 28, p. 28). If the unions had the right to make such wage scale demands, the manufacturers had the right to accede thereto and to agree to the consequent closed shop.

(6) Of course, every closed shop, whether closed as to non-union employees or non-union goods or both, may make more costly to the public the product of such shops and will of necessity restrain trade and competition in services or goods or both; but such is the cost which the American people expect and have decided to pay for free labor and for higher standards of living and of purchasing power on the part of the millions who labor and for the collective bargaining which preserves and advances those standards.

Under the decision of the courts below, there is, as we see it, the anomaly that labor may lawfully strike in support of wage scale demands which are lawful as demands, but if the granting of these demands will mean that the employers must seek or may get better prices for their products, then both the laborers and the employers "split the take" and the laborers become criminals.

That a closed shop—closed as to both employees and materials—is a lawful labor objective and hence a lawful employment agreement, is thoroughly well settled and is illustrated in *United States* v. *Carozzo* (the *Hod Carriers* case), 313 U. S. 539, affirming 37 Fed. Supp. 191, 193. See also:

Gundersheimer's, Inc. v. *Bakery, etc. Union*, 119 Fed. 2d 205 (U. S. Court of Appeals *for* District of Columbia).

United States v. *B. Goedde & Co.*, 40 Fed. Sup. 523;

Rambusch Decorating Co. v. *Brotherhood of Painters*, 105 Fed. 2d. (C. C. A. 2d) 134; cert. denied 308 U. S. 587.

(7) Every agreement settling a labor dispute presupposes some "interest" on the part of the employers, quite as much as some "interest" on the part of the union, in making the agreement at all. It has never heretofore been supposed that only agreements which leave no shred of advantage to the employers or only agreements the cost of which cannot be passed even in part to the public, are the only agreements within the law.

(8) The law as declared below provides in its logic and in its effect a potent weapon for the destruction of the whole principle and basis of the closed shop, particularly when embodied in a settlement agreement made with a group of employers.

It assures the Government, or some third party asserting injury, a ready and certain means of always claiming motive or purpose and thus of turning every such agreement into a jury issue,—and, what is much worse, a ready and certain means of claiming that the self-interest or purpose of the union is outlawed by the self-interest or purpose of the employers.

POINT II

The views of the Trial Court that an agreement terminating a labor dispute was a combination; that labor's immunity ceased when such combination occurred; that such combination was a violation of Section 1 of the Sherman Act even though the Union's objective was to protect wages and working conditions, provided the effect was to restrict interstate commerce; and that the Clayton Act and the Norris-LaGuardia Act were not relevant to any issue before the jury, are abundantly revealed and emphasized by the Trial Court's charge and by its rejection of all requests by the labor defendants for clarifying instructions.

These refusals were error and proceeded on conceptions of law which, we submit, violated both statute and settled judicial authority.

At the conclusion of the trial, the labor defendants unsuccessfully presented in various forms a large number of requests for instructions concerning agreement with employers, which may be summarized briefly as follows:

1. Members of a union may lawfully "decline to work upon or handle" products made under conditions of employment deemed by them to be unfair to their union (1175).

2. In considering the agreement, a relevant issue as regards the labor defendants was whether or not they were "acting in their own self-interest to carry out legitimate objectives of labor" in the matter of wages and working conditions (1177).

3. "The elimination of price competition based on differences in labor standards" is a lawful objective of a labor union, "since in order to render a labor combination effective it must eliminate the competition from non-union made goods" (1182). (*Apex Hosiery v. Leader*, 310 U. S. 469, 503-4.)

4. In considering the agreement, a relevant issue as regards the labor defendants was whether they had "acted in their own self-interest and to carry out their own objectives of labor such as a better wage scale and conditions of employment and more jobs for the union members" (1182).

5. The making of the agreement of September 21, 1936 was not in itself a violation of the Sherman Act (1183).

6. That agreement "was legal on its face" (1189).

7. The members of the defendant local unions had the lawful right to take the position that they "would do no work upon any material or article that has had any operation performed on same by saw mills, mills or cabinet shops or their distributors that did not conform to the rates of wage and working conditions prescribed by the agreement of September 21, 1936" (1183).

8. "If the defendant unions and their members deemed it to their interest to refuse to work on material not manufactured in conformity with the rates of wage and working conditions prescribed by the agreement of September 21, 1936, they had a legal right so to do" (1184).

9. In that event "the mere fact that such material may have been made in some state other than California does not render such refusal unlawful or in violation of the Sherman Act" (1184).

10. The agreement could not be a violation of the Sherman Act unless the jury found that it was not made by the labor defendants "to carry out the interests and labor objectives of the unions but solely with intent to conspire and combine with the employer defendants to make the unions the instrument of the employer to restrain interstate commerce to eliminate competition from millwork and patterned lumber in interstate commerce" (1186).

11. In considering the agreement a relevant issue as regards the labor defendants was whether the pro-

ecution had substantiated the allegations in the Indictment (32) that in the making thereof "the defendant unions were not attempting to enforce or protect the right to bargain collectively nor acting in the course of a legitimate labor dispute as to wages, hours and working conditions or as to any other legitimate objective of labor, but solely to prevent the manufacturers against whom the alleged combination and conspiracy was alleged to be directed from engaging in interstate commerce in millwork and patterned lumber in the San Francisco Bay Area" (1191).

12. "'A case involves or grows out of a labor dispute when it involves persons engaged in the same industry, trade, craft or occupation, or who have direct or indirect interests therein and a person or association shall be held to be participating or interested in a labor dispute if he or it is engaged in the same industry, trade, craft or occupation in which such dispute occurs" (1179).

13. In considering the agreement, a relevant issue as regards the labor defendants was whether it "resulted from negotiations to fix terms and conditions of employment" "and grew out of a labor dispute" (1179).

14. In considering the agreement a relevant issue as regards the labor defendants was whether they made it "in order to establish a uniform condition of labor conditions, unionize other mills in the industry, gain jobs or better wages, or for any other legitimate purpose of a labor organization" (1180).

15. "Either agreements or acts done in furtherance thereof by labor defendants for the purpose of furthering the unionization of other shops in the same industry in order to better the conditions and wages of the employees is a legitimate labor activity and does not violate the Sherman Act" (1182).

The Trial Court threw aside all these requests. Exceptions were duly taken, and Assignments of Error were duly filed (1128, 1155-69, 1441, 1591). We submit that under

the Clayton Act, the Norris-LaGuardia Acts and settled judicial authority, we were entitled to these instructions.

Especially notable is the refusal of the Trial Court to charge the requests which we have numbered 10 and 11, *supra*. The Circuit Court of Appeals has based its decision on the predicate that the jury would have been warranted by the evidence in finding the alleged facts upon which that Court justified the conviction but which the Trial Court, by refusing these requests, held to be irrelevant as essential to a conviction.

Our position is and was that even those alleged facts would not justify in law the conviction of the labor defendants under Section 1 of the Sherman Act. But, deeply concerned by the extent to which throughout the trial the Trial Court had reduced the issue to the bare elements of a combination and restraint of trade, and hence had refused our motions for a dismissal and directed verdict, we submitted these requests as a precautionary second line of defense.

POINT III

The views of the law as expressed by the courts below are directly contrary to settled judicial authority. No other such decision has been made either before or since the Norris-LaGuardia Act.

The basic hypothesis of the Trial Court is that, although a union may with immunity under the Norris-LaGuardia Act demand as working conditions a shop closed against non-union employees or non-union goods, irrespective of where they come from, nevertheless accession and agreement by employers to such demand constitute as matter of law "a combination" which forfeits the immunity under the Clayton Act and the Norris-LaGuardia Act and is condemned by the Sherman Act, if goods which might come from other states are included in or affected by such closed-shop agreement.

No decision upholding such basic hypothesis has been or can be cited.

On the contrary, there are many decisions, including decisions by this Supreme Court, holding the very opposite.

These judicial decisions have within a month been fully analysed and their effect declared by the Circuit Court of Appeals in the *Allen Bradley Company* case, and a copy of the opinion therein is hereto annexed (pp. 79 *et seq.*, *post*).

Hence, we shall content ourselves with fortifying that analysis with a few observations of our own.

The Hod Carriers Case

On the authority of the *Hutcheson* case, the Supreme Court two months later affirmed in *United States* v. *International Hod Carriers' Building and Common Laborers' District Council*, 313 U. S. 539, the decision of the Illinois Federal Court dismissing the indictment as insufficient. In the District Court that case was reported as *United States* v. *Carrozzo*, 37 F. Supp. 191.

The importance of that decision in the present instance is that there *there was an agreement* between the union defendants and the employers, the effect of which was adverse to the interstate commerce of those employers and of manufacturers in other states, but the legality of which was sustained as a lawful accession by the employers to the demands and rights of the union defendants.

According to the indictment in that case, the union defendants by calling strikes and threatening to strike had forced paving contractors in the Chicago area to enter into working agreements with the defendant unions "requiring paving contractors using truck-mixers to employ the same number of men which they would employ if truck-mixers were not used" (p. 193). Also, according to the indictment, this conduct and these agreements were intended to exclude, and did exclude, mechanical truck-mixers from the Chicago area and thereby adversely affected the manu-

facturers of the truck-mixers, all of whose factories were outside of the State of Illinois.

According to the opinion of Judge SULLIVAN in that case, the indictment not only alleged the coercing of the Chicago paving contractors into such agreements, but it also alleged (p. 193):

> "2. *The enforcement of these working agreements* between the Hod Carriers' Council and contractors by ordering member unions to strike, and by threats to strike.
>
> "3. Preventing building contractors in the Chicago area from using truck-mixers on building projects by strikes or threats of strikes.
>
> "4. Refusing to approve the employment of, and ordering union members not to work upon, any building or paving project where truck-mixers are used.
>
> "5. *Warning manufacturers of truck-mixers, and prospective purchasers thereof, that truck-mixers are not permitted to be sold or used in the Chicago area.*"

Obviously, the factual allegations of the indictment in this Chicago case, both as to the nature of the agreements with the local employers and as to the action of the local union defendants thereunder, went far beyond anything in either the present Indictment or in the evidence in the present case. There the union demanded what is called "excess employment,"—an objective altogether different from merely better wages as here. There, also, the union actually warned the manufacturers of truck-mixers (all of which were made in other states) that "the truck-mixers are not permitted to be sold or used in the Chicago area." In the present case, there was no such agreement and there was no such action, for the unions were not refusing to work on materials made outside the Bay Area merely because so made, but only on materials made at a lower scale of wages, irrespective of where they were so made.

Building & Construction Trades Council Case

An achieved agreement with employers engaged in interstate commerce was also alleged in the indictment in the above case, held insufficient on demurrer by the Supreme Court (313 U. S. 539) on the authority of the *Hutcheson* case.

There the indictment alleged:

> "As a result of the wrongful and unlawful conspiracy engaged in by the defendants herein, it has become necessary for aforesaid trucking and drayage firms to hire trucks driven by individuals acceptable to defendants named herein, at an expense far in excess of compensation received by them under their said contracts with aforesaid interstate carriers."

The United Brotherhood of Carpenters Case

An achieved agreement with interstate purchasers and users of plywood was also alleged in the indictment in the above case, held insufficient on demurrer by the Supreme Court (313 U. S. 539) on the authority of the *Hutcheson* case.

There the indictment alleged:

> "The said acts of the defendants (strikes and picketing) have caused purchasers and users to cease to purchase Douglas fir plywood from the Harbor Plywood Corporation in the State of Washington for direct shipment from that state to other states in the United States."

The Rambusch Case

In *Rambusch Decorating Co. v. Brotherhood of Painters*, 105 Fed. (2d) (CCA 2) 134, cert. den. 308 U. S. 587, there was *a written agreement* between an employer and an international labor union affecting an interstate industry. The question was whether that agreement was a violation of the Sherman Act.

The agreement provided that where a job was done by an employer in a state other than New York (where his seat of business was), he should pay whichever wage scale was the highest, and whichever set of hours was more favorable to labor—either the scale prevailing on the site of job, or the scale prevailing in New York.

The employer took a contract to paint a hotel in Roanoke, Virginia. The New York scale was $1.50 an hour, and the Roanoke scale was 75¢ an hour. The employer found he could hire no painters in Roanoke except on condition that he comply with the Union's demand that he pay the New York scale, to wit; $1.50 an hour. This demand doubled the employer's payroll. It eliminated his ability to compete in Roanoke with local contractors; and made it impracticable for him to bring his materials and supplies from New York to Roanoke. There is no question but that the Sherman Act covers the sale of services as well as the sale of commodities. (*U. S.* v. *Gold*, 115 Fed. (2d) (CCA 2) 236, 238.)

Nevertheless, the Circuit Court of Appeals for the Second Circuit unanimously reversed a determination that this agreement was violative of the Sherman Act. It said the following, which is directly applicable to the present case (138):

> "Any contract designed to secure higher wages may restrain trade in one sense if it is effective, for it will hamper the weak employer who cannot afford the increase. In another sense, however, it may promote commerce by making for better and more peaceful labor relations. A contract with such a purpose is hardly to be held illegal of itself, or else all union organization goes."

The Goedde Case

Another case in which there was *an agreement* between the local unions and the local employers is *United States* v. *B. Goedde & Co.*, 40 F. Supp. 523,—a decision by Judge

LINDLEY in the Eastern District of Illinois. There motions to quash the indictment were granted. According to the indictment "contracts" had been executed between the defendant mill owners and the defendant unions, (a) providing for employment of only such persons as were members of the union, *i. e.*, a closed shop, (b) permitting the mill owners to use the American Federation of Labor Union Label, and (c) "*excluding unlabeled lumber.*" These contracts were charged to be a combination and conspiracy in violation of the Sherman Act inasmuch as they had the effect of excluding or obstructing unlabeled lumber seeking to come into the East St. Louis area from other states,—thus creating, in these respects, a duplicate of the present case.

Judge LINDLEY *ruled that the Supreme Court's decision in the Hutcheson case required the application to such an agreement of the test of the Norris-LaGuardia Act.* He said—in language directly applicable to the agreements in the present case (p. 532):

> "In following the prescribed test, let us see which of the alleged means employed and acts of labor unions are exempted from criminal prosecution under the Clayton Act. In the analysis hereinbefore set forth the acts mentioned under 1 (a) and (b) (Paragraph 48 of the indictment), relating to contracts for closed shops and use of the label are clearly within the legitimate activities of unions as contemplated by the Clayton Act. Under 2 (a) and (b), (c) and (d) (Paragraph 49), it is alleged that the unions warned builders that they would not work with unlabeled materials; warned purchasers that such material would have to be removed and returned to the manufacturer and forced the makers of such material to remove the same from the job and return it to the plants. It would seem obvious that these acts are likewise granted immunity by the Clayton Act. Under 3 (Paragraph 50) we have alleged intimidation of builders by strikes and threats to strike, thereby forcing them to buy union-labeled material, although

similar products could be purchased at lower prices in other states. This too is exempt within the language of the Clayton Act. The resulting effect upon interstate commerce is purely incidental, United States *v.* Hutcheson, 312 U. S. 219, at page 241, 61 S. Ct. 463, 85 L. Ed. 788. Each of the acts thus far mentioned apparently is, by the Clayton Act, recognized as a legal economic weapon of labor unions."

It is true that Judge LINDLEY further stated, by way of dictum, that other charges in the indictment as to the use of violence and threats and as to the refusal to install material *merely because it was manufactured in states other than Illinois,* had no immunity under the Norris-LaGuardia Act; but those statements have no bearing on the present case, because here no violence was charged in the indictment and because the labor defendants were not charged in the indictment with refusing to work on materials coming from other states *merely because they came therefrom.* Moreover, no such issues were here presented to the jury. The sole charge here was that the labor defendants would not work on materials manufactured under less favorable rates of wage and working conditions no matter where such manufacture occurred. According to the Trial Court's charge to the jury herein an agreement *to that effect* constituted as a matter of law —and without more—a violation of the Sherman Act.

On the other hand, under the decision of Judge LINDLEY, just such a refusal by the labor defendants and just such an agreement by employers recognizing and giving effect to just such a refusal, was held to be, as regards the labor defendants, within the immunities of the Norris-LaGuardia Act.

The Gundersheimer Case

Another case involving *an agreement* is *Gundersheimer's Inc.* v. *Bakery, etc. Union,* 119 Fed. 2d, 205 (U. S. Court of Appeals for the District of Columbia).

There a bakery corporation, having its shop in the District of Columbia, brought an action under the Sherman Act for treble damages by reason of a strike called among its employees to enforce the following demands (p. 206):

> "You can't buy cakes in Philadelphia, and you cannot make cakes in your own plant *unless you will agree not to buy any cakes out of town* * * * the reason being, they said, the wage scales in Philadelphia paid to men working in the plant there were lower than the scales paid to the men here."

There the defendant union was demanding that the plaintiff-employer *agree* with it not to purchase in Philadelphia and import into the District of Columbia any cakes made in Philadelphia where a lower wage scale was being paid. The Court of Appeals held that the Union had a lawful right to demand *such an agreement* and to close down the plaintiff's business in order to coerce such an agreement,—notwithstanding that both the object and the express provisions of the agreement would prevent the plaintiff from securing, through interstate commerce, products for its shop.

Obviously, if the union had the right to destroy the plaintiff's business in order to coerce the agreement which it demanded, its obtaining that agreement could not be criminal.

Other Controlling Decisions

U. S. v. *American Federation of Musicians*, 318 U. S. 741;

Bakery Drivers Local v. *Wohl*, 315 U. S. 769;

American Federation of Labor v. *Swing*, 312 U. S. 321;

Milk Wagon Drivers' Union v. *Lake Valley Co.*, 311 U. S. 91;

New Negro Alliance v. *Sanitary Grocery Co.*, 303 U. S. 552;

Lauf v. *E. G. Shinner Co.*, 303 U. S. 323;

Senn v. *Tile Layers Union*, 301 U. S. 468;
Amer. Foundries v. *Tri-City Council*, 257 U. S. 184; 209;
Barker Painting Co. v. *Brotherhood of Painters*, 15 Fed. (2) (C. C. A. 3) 16;
International Ladies Garment Workers' Union v. *Donnelly Garment Co.*, 119 Fed. (2) (C. C. A. 8) 892;
Taxi-cab Drivers' Local Union v. *Yellow Cab Co.*, 123 Fed. (2) (C. C. A. 10) 262;
International Ass'n v. *Pauly Jail Bldg. Co.*, 118 Fed. (2) (C. C. A. 8) 615;
U. S. v. *Local 807*, 118 Fed. (2) (C. C. A. 2) 684; 315 U. S. 521;
Green v. *Obergfell*, 121 Fed. (2) (Ct. of App. D. C.) 46;
U. S. v. *Gold*, 115 Fed. (2) (C. C. A. 2) 236.

POINT IV

The case of *United States* v. *Brims*, 272 U. S. 549, has no application for a number of reasons. If it can have any bearing, that bearing makes for a reversal.

These reasons are:

1. The case was decided on November 23, 1926,—six years before the Norris-LaGuardia Act was enacted.

2. It was decided at a time when *Duplex Co.* v. *Deering*, 254 U. S. 443, was supposed to represent as regards labor unions the proper view of the Sherman Act and the Clayton Act.

3. The Supreme Court did not undertake to pass on any question except the holding of the Circuit Court of Appeals (6 Fed. (2d) 98) that the evidence was insufficient to support the indictment as the Circuit Court of Appeals interpreted it.

In other words, the Supreme Court did not reinstate the verdict or order a new trial. It merely held that the evidence was sufficient for that purpose, and then sent the case back to the Circuit Court of Appeals to determine whether any of the "other assignments of error" presented by the defendants were proper.

4. The Supreme Court's decision turned on a question of fact peculiar to that Record, to wit, whether or not there was sufficient evidence to sustain the charge in the indictment and the finding of the jury that the agreement in the case was not one "merely whereby union defendants were not to work upon non-union made millwork" wherever it came from (p. 551), but rather was an agreement in the interest of Chicago manufacturers that the products of their competitors in other states would be effectually kept out of Chicago with the aid of the union which they bribed with an offer of higher wages. The Circuit Court of Appeals had held that the evidence was insufficient to sustain the latter version, whereas the Supreme Court held that the evidence warranted the submission of such an hypothesis to the jury.

In the present case the court instructed the jury that (1153):

> "The sole question is whether defendants intended to or did restrain the shipment of millwork and patterned lumber in interstate commerce pursuant to an understanding between the labor union defendants and the non-labor defendants."

No such test can be found in the opinion of the Supreme Court in the *Brims* case.

(5) That the combination in that case was instigated by the Chicago manufacturers for their self-interest was emphasized in the brief for the United States before the Supreme Court. To quote an example (p. 38).

> "The defendants expected the Chicago manufacturers to largely monopolize that (the local) field of manufacture and sale of millwork formerly carried on by the non-union manufacturers of other states."

In the present instance, the negotiations which resulted in the contracts of 1936 and 1938 were initiated by the demand of the unions for better wages and working conditions (606-10, 614); and it was the unions which demanded the clause that they would "only work on union goods" (609).

POINT V

In the important matters of the Brotherhood's union label and of non-union articles—matters vital to the Brotherhood and trade unionism,—the Trial Court basically erred in its exclusion thereof as irrelevant.

(1) The right of a national or international labor union to adopt a union label and to encourage or bind its members not to work on material not bearing such label or not union-made, is a necessary principle of trade unionism and has never before been rejected judicially as a lawful labor objective.

Even under the prosecution's own interpretation of the indictment, it should have been held relevant for the jury to decide whether the unions' attitude against certain materials involved in the testimony was merely because they came from outside the state, or rather was because they were non-union made or unlabelled. Yet the jury were instructed to the contrary (1151-2).

The Constitution of the United Brotherhood provided, concerning the union label, as follows (459, 460-1):

> "The attached design of label shall be the official label of the United Brotherhood. . . ."

"It shall be the duty of all district councils, local unions and each member to promote the use of trim and shop-made carpenter work, hotel, bank, bar, store and office fixtures, and of church, school, household furniture, etc., and to make generally known to the members of the local union that it is necessary to all mill and shop members and the United Brotherhood that products made in factories, shops or mills where only members of the United Brotherhood are employed should be installed by fellow members."

"Members of this organization should make it a rule, when purchasing goods, to call for those which bear the trademark of organized labor."

The obligations assumed by every member on his initiation include (766):

"I will use every honorable means to procure employment for Brotherhood members, agree to ask for the union label and purchase union-made goods."

The foregoing provisions of the Brotherhood's Constitution express elementary rights of trade unions, both at common law and under the Clayton and Norris-LaGuardia Acts.

Nevertheless, the Trial Court held that these constitutional provisions and the observance of them by the local unions in the Bay Area were irrelevant and not to be considered by the jury. The Court charged (1152):

"Some testimony has been heard here concerning the union label of the United Brotherhood of Carpenters and Joiners of America. In this connection I charge you that whether the millwork and patterned lumber involved in the testimony in this case was manufactured in mills whose employees were members of the United Brotherhood of Carpenters and Joiners of America or of its affiliated unions, or whether such millwork and patterned lumber bore a union label, is not to be considered by you."

On the subjects of the union label and of non-union goods, the Brotherhood submitted various requests for instructions, all of which were refused. These refusals are set forth in the Assignments of Error beginning on pages 1541 *et seq.* and 1566 *et seq.*

(2) Moreover, the Trial Court also ruled throughout the trial that the absence of the union label on articles which came before the union defendants for work or in competition with union-made articles, was wholly immaterial and irrelevant; and that, as regards any instance being put in evidence by the prosecution, the defense could find no support in the fact that the articles involved were non-union-made or unlabeled.

Take, for instance, the following from the cross examination of the prosecution's witness, E. W. Yates. On direct examination Yates had testified that he was the manager of F. S. Buckley Door Company which specialized in sashes and doors (347); that his concern had brought in from out the state some four or five carloads of interior woodwork (348); and that the local union had successfully demanded that, since this material was not union-made, the Company (349)

> "enter into an agreement to operate a closed shop and stamp the goods we sent out of our place."

On cross examination, counsel for the labor defendants sought to show that the goods thus brought to the shop were not only not stamped with the union label but were made by the carpenters' aggressive rival, the C. I. O. This effort the Court completely ruled out as immaterial (365).

The same thing happened with the prosecution's next witness, Willard B. Jefferson. He testified that he brought in some millwork from a point without the state. On cross examination the unions' counsel was prevented by the Court from showing that the material was non-union lumber (369).

These rulings were excepted to (365-366, 597-8, 605), and are assigned as error (1456-7, 1604).

How disastrous to the defense were these and many like rulings is illustrated by the prosecution's own highly experienced witness, Lee Moffett, who testified that the seemingly opprobrious term or placard "Hot Cargo" merely meant "that the shipment came from some mill that did not bear the union label of the United Brotherhood" (201).

(3) Thus, by these exclusions of the unions' proof, the prosecution was enabled to create the erroneous impression that those shipments were picketed or placarded by the labor defendants not in the exercise of their constitutional right of free communication and of opposition to non-union made and unlabelled articles, but merely because the shipments came from without the state. (See *Senn* v. *Tile Layers Union*, 301 U. S. 468; *Bakery, etc., Local* v. *Wohl*, 315 U. S. 769.)

POINT VI

The Trial Court erred in refusing the Brotherhood's requests for instructions as to the law governing the question of imputation of guilt to it by reason of any alleged acts of its officers, and in charging the jury as it did on this vital subject.

(1) It is highly significant that in the case of each local union which was indicted certain of its officials were indicted also, whereas the United Brotherhood was indicted but none of its general executive officers were.

Moreover, under the Brotherhood's General Constitution, the local unions were given a very broad autonomy in the matter of government, adoption of laws, trade rules and policies, strikes and other union activities (461-2).

Under these circumstances the United Brotherhood (the unincorporated international body) was vitally concerned to have the jury fully instructed on the law of *the imputation of guilt*, for there was not a particle of evidence that the United Brotherhood through its General Executive Board or the body of its membership did anything at all in the premises or even had any knowledge thereof.

The General Convention is the supreme authority of the Brotherhood. It meets every four years and is composed of delegates elected from all over the United States (559).

The supreme governing body of the United Brotherhood (subject only to its General Convention) is the General Executive Board which consists of a number of members, seven of whom are elected from different regions (558).

Nevertheless, notwithstanding this established background, the Trial Court charged the jury (1138):

> "It has been stipulated in this case that labor unions are associations. Like corporations, associations are separate entities within the meaning of the Sherman Act, and may be found guilty of violations of that Act, separately and apart from the guilt or innocence of their members.
>
> "You are to determine the guilt or innocence of the labor unions which are defendants in this case in the same manner as you determine that of the corporations, that is, by an examination of the acts of their agents."

In the case of corporations the Trial Court charged that criminality was to be determined by the following test (1137):

> "The act of an agent done for or on behalf of a corporation and within the scope of his authority, or an act which an agent has assumed to do for a corporation while performing duties actually delegated to him, is deemed to be the act of the corporation."

The United Brotherhood excepted and has assigned error (1155-6, 1158, 1529, 1530, 1598).

Obviously, the test or standard thus given to the jury was that applicable in *a civil case*, where there is such a principle as imputed responsibility. But no such principle exists in *a criminal case*, where guilt is and must be personal.

Here there is no proof or even suggestion that the United Brotherhood ever authorized or directed, any of its General Executive Officers or any other agent to commit a crime on its behalf. The authority delegated by the Constitution cannot, by any stretch of the imagination, be deemed to include commission of crime for or in the name of the United Brotherhood.

(2) In this criminal case the real test or standard applicable to the United Brotherhood is thus stated in Section 106 (U. S. C. A., Title 29) of the Norris-LaGuardia Act:

> "No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof."

In consequence, the United Brotherhood asked the Trial Court to instruct the jury (Request 56, p. 1173):

> "You are instructed that no labor union or organization can be found guilty in this case for an unlawful act or acts, if any, of individual officers, members or agents, unless you find (896) upon clear proof from the evidence that such labor organization actually participated in, or actually authorized such unlawful act, if any, or ratified such an act, if any, after actual knowledge thereof."

It also asked the Trial Court to instruct the jury (Request 55, p. 1172):

> "You are instructed that an officer of a union which is an unincorporated association is not authorized merely by virtue of his office to make his union a party to an unlawful conspiracy. In order to bind any union organization, therefore, by the act of a representative or officer it is necessary to find that the union had authorized or ratified the act."

The United Brotherhood also was vitally concerned to have the jury instructed that the United Brotherhood was not responsible *ipso facto* or on any principle of imputation for any criminal acts of any of its local unions or district councils. The following request on this subject would seem elementary (Request 57, p. 1173):

> "You are instructed that an international trade union, that is, the international body, is not responsible for the acts of a district organization or union affiliated with and chartered by it except as such international body expressly authorizes the act of the local union or association. The International Brotherhood of Carpenters and Joiners of America cannot be found guilty in this case unless you find that it authorized acts to be done, or performed such acts with the intent of restraining interstate commerce pursuant to a conspiracy with the employer defendants to act as the instrument of the employers to suppress competition."

All these requests were refused. There are exceptions and Assignments of Error (1155, 1158, 1602, 1532-3, 1598-9).

(3) That the Court's charge and its refusals of Requests 55 and 56 *supra* were erroneous is determined by the decision of the Circuit Court of Appeals for the Second Circuit in *United States* v. *International Fur Workers Union*, 100 Fed. (2d) 541, certiorari denied 306 U. S. 653.

In that case, in a prosecution under Section 1 of the Sherman Act, a verdict of guilty was rendered against an international union (International Fur Workers Union of the United States and Canada) and against a number of its local unions and certain officers of the international and of the local unions. This verdict against the international union was reversed by the Circuit Court of Appeals *for the very error that occurred in the present case.* To quote (547):

> "But an officer of an unincorporated association, no more than an officer of a corporation, is not authorized merely by virtue of his office to make his principal a party to an unlawful conspiracy. See *Coronado Coal Co.* v. *United Mine Workers*, 268 U. S. 295, 45 S. Ct. 551, 69 L. Ed. 963; *Hill* v. *Eagle Glass & Mfg. Co.*, 4 Cir., 219 F. 719, modified on other grounds in *Eagle Glass & Mfg Co.* v. *Rowe*, 245 U. S. 275, 38 S. Ct. 80, 62 L. Ed. 286. All that the court said on this subject was that if the individual defendants did the things charged against the unions 'upon behalf of the unions,' they might be found guilty along with the individuals. To this the appellant unions excepted. It was erroneous; it excluded the issue whether the unions had authorized or ratified what their officers did upon their behalf. For this reason the conviction of each of the labor union appellants must be reversed."

In *U. S.* v. *Local 807*, 118 Fed. (2d) (C. C. A. 2) 684, Judge Clark in his concurring opinion said (p. 688):

> "It is hornbook law that, absent a clear legislative intent, an unincorporated association does not commit crimes, 7 C. J. S., *Associations*, § 17, p. 43."

(4) That the Court's refusal of Request 57 *supra* was also error is conclusively determined by *Coronado Co.* v. *United Mine Workers*, 268 U. S. 295, and *Truck Drivers' Local* v. *United States*, 128 Fed. (2d) (C. C. A. 8) 227.

In the *Coronado* case, the plaintiff sued to recover damages for an alleged conspiracy by the defendants in vio-

lation of Section 1 of the Sherman Act. In the Trial Court there was a directed verdict and judgment for the defendants which was affirmed by the Circuit Court of Appeals. The Supreme Court affirmed this determination in the case of the International Union of Mine Workers of America, but reversed it in the case of the defendant local unions and of the defendant individuals who were officers of the International and of the local unions,—thus drawing a sharp distinction between, on the one hand, the responsibility and liability of an International Union under Section 1 of the Sherman Act and, on the other hand, its officers and local unions and their officers.

In that case one James K. McNamara, who was himself a defendant and secretary of one of the defendant local unions, had turned state's evidence and had testified that he had had a talk with the defendant John P. White, who was President of the International, in which White in effect instructed him to do various illegal and violent acts to prevent coal from being mined and sent into interstate commerce. For example, White said (302):

> "If they (the operators) do that (open the mine) we must prevent the coal from getting into the market, because if Bache coal, scab dug coal got into the market it would only be a matter of time until every union operator in that country would have to close down his mine, or scab it, because the union operators could not meet Bache competition. When you go back to Hartford, I want you to tell the men what I have told you, but don't tell them I have told you."

McNamara further testified that White also told him (303):

> "Now you boys will not lose a day and your expenses will be paid for every day you are in this trouble."

McNamara further testified (303):

> "It was generally understood that the National Organization was going to pay us for the time we lost

> * * *, and I thought the only man to go to would be White to get it, because he was the National President."

McNamara further testified that after the violence and strike he met White at Hartford and asked him (303):

> "'When will I get my money that I was promised for this work?' to which White replied: 'I will take it up with the Board as soon as I can.'"

White made speeches of "earnest approval" of the strikes, and reported on them to the International Board. Editorials in the International's magazine defended them (p. 300).

Nevertheless, and notwithstanding that the case before it was merely *a civil case*, the Supreme Court held that these acts by the President of the International and the acts of conspiracy and violence by local unions and their officers and members did not bind and render liable the International. The Supreme Court quoted from the General Constitution of the United Mine Workers of America provisions which somewhat resemble the General Constitution of the United Brotherhood of Carpenters and Joiners of America, and then said (300):

> "It does not appear that the International Convention or Executive Board ever authorized this strike or took any part in the preparation for it or in its maintenance, or that they ratified it by paying any of the expenses."

(5) Also conclusive *a fortiori* is the decision of the Circuit Court of Appeals for the Eighth Circuit in the criminal case of *Truck Drivers' Local No. 421, etc.* v. *United States*, 128 Fed. (2d) 227,—decided May 22, 1942.

There, Truck Drivers' Local No. 421, its financial secretary and business agent were convicted on an indictment under Section 1 of the Sherman Act. This conviction was affirmed as to the financial secretary, but was reversed as

to the union and the business agent, on the ground that the evidence was insufficient.

In reversing the conviction of the union, the Circuit Court of Appeals held that the union could not be found guilty because of the actions of its president (who had also been indicted but died before the trial), or because of the actions of a subordinate body of the union known as the "milkmen's division", or because of the actions of the members of such subordinate body, or because of the actions of the union's financial secretary.

The Circuit Court discussed at length the aforesaid decision of the Supreme Court in the *Coronado* case and quoted therefrom; and then said (p. 235):

> "We do not believe that on the record before us a jury could be permitted to find that the actions of the milkmen's division and its members, the efforts of the president of the union and the hearings held by the disputes committee and the executive board could be imputed to the union as a matter of general agency. To bind the union in a situation such as this, actual and authorized agency was necessary; mere apparent agency would not be sufficient to take the matter to the jury, unless the circumstances were so strong as competently to support an inference of actual authority."

See also *Barker Painting Co.* v. *Brotherhood of Painters*, 15 Fed. (2d) (C. C. A. 3) 16, 18.

November 6th, 1944.

Respectfully submitted,

JOSEPH O. CARSON,
CHARLES H. TUTTLE,
THOMAS E. KERWIN,
HUGH K. McKEVITT,

Of Counsel for Petitioner.

CHARLES H. TUTTLE,
Attorney for Petitioner,
and a member of the bar of this Court.

APPENDIX A

Opinion of the Court Below

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

LUMBER PRODUCTS ASSOCIATION, INC., a corporation, *et al.*, *Appellants*, *vs.* UNITED STATES OF AMERICA, *Appellee.*	No. 10,011 Aug. 23, 1944

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division

---

Before: GARRECHT, DENMAN and HEALY, Circuit Judges.

DENMAN, Circuit Judge:

This is an appeal from a judgment of the district court sentencing appellants for violation of Section 1 of the Sherman Anti-Trust Act,[1] on findings the several appellants guilty or acting on pleas of nolo contendere. They were among a large group indicted on two counts for con-

1. 15 U.S.C.

binding and conspiring to violate that Act. The second count was dismissed upon motion of the government.

For convenience in describing the parties to the alleged conspiracy, one group of the present appellants will be designated as the "Union Group" and the remaining appellants as the "Manufacturer Group." The former group is composed of the United Brotherhood of Carpenters and Joiners of America, an international union affiliated with the A. F. of L., two area Trade Councils, two local unions, affiliated with the above international, and several officers and members of these associations. The latter group is composed of Trade associations, corporations and individuals.

All of the appellants were engaged in or otherwise associated with the manufacture, distribution, sale or installation of mill work and patterned lumber in the San Francisco Bay Area.

The facts alleged to constitute the charge of the indictment show that prior to 1936 at least 80% of the mill work and patterned lumber used in the San Francisco area was produced in states other than California. The principal area of production was in Washington and Oregon. The processing of lumber products in the latter two states was with the most developed equipment and on a large scale mass basis in which, in some instances, raw timber was converted into finished lumber in a single continuous operation. This method of production was in marked contrast to the apparently more costly, small plant operations of the Bay area manufacturers, in which the skilled labor of craftsmen was used. The labor used in the Washington and Oregon production, though organized, was on a lower wage scale than that of the Bay area mill workers at the time the alleged conspiracy was formed, though it does not appear that the annual wage of the out-of-state labor was lower or their cost of living as high.

Appendix A

The Manufacturer Group involved here produced substantially all the mill work and patterned lumber made in the area. All of the craftsmen skilled in the production or installation of these products had to be members of a local of the Union Group before they could work for the Manufacturers. It was alleged that under these circumstances the combined power of these two groups was great. It is apparent that such monopoly power well could impose a greatly increased cost to the smaller home builder and others in the great building activity of such a state as California, with its extraordinary immigration of the past two decades.

It was further alleged that in 1936 the Union Group demanded an increase in wages. This demand was acceded to by the Manufacturer Group in exchange for an agreement by the unions to prevent the sale and shipment to the Bay area of products manufactured outside of California. This agreement was reduced to a written contract between the parties in which they agreed that ". . . no material will be purchased from, and no work will be done on any material or article that has had any operation performed on same by Saw Mills, Mills or Cabinet Shops, or other distributors that do not conform to the rates of wage and working conditions of this agreement." This exclusionary clause was alleged to be subject to certained named exceptions.

The Manufacturer Group circulated among the trade price lists and market reports which effected artificial and noncompetitive prices for mill work and patterned lumber. These were enforced by the Union Group by picketing, work stoppages and other means, preventing the use of materials purchased in violation of the terms of the contract.

On the basis of the alleged facts and conduct it was finally charged that the object and effect of the combination was to stop the sale of mill work and patterned lum-

ber by manufacturers in other states in the San Francisco area and to prevent lumber yards and jobbers in that area from purchasing such out-of-state products and thereby permit the raising and fixing of prices in such products. It was further charged that the conspiracy had succeeded in its object and that prices of mill work and patterned lumber had been arbitrarily and unreasonably increased.

All of the defendants demurred to the indictment. This was overruled by the trial court. Thereafter all the parties here making up the Manufacturers Group withdrew their pleas of not guilty and entered pleas of nolo contendere.[2] The parties falling in the Union Group maintained their plea of not guilty, were tried and found guilty by verdict of a jury.

The first issue common to all of the appellants is the sufficiency of the indictment. It is contended that the trial court erred in refusing to sustain the demurrers which were based on the ground that the allegations of the indictment failed to state a crime under the Sherman Act in that the agreement between the parties merely embodied legitimate objectives of labor, successfully obtained through the process of collective bargaining in termination of a labor dispute. Appellants urge here that the doctrines of the Supreme Court decisions in Apex Hosiery v. Leader, 310 U.S. 469, and United States v. Hutcheson, 312 U.S. 219, are controlling.

Appellants argue that nothing unlawful is charged, for it is well established that labor may lawfully refuse to work on any product it sees fit and from this freedom it follows that labor may make the intention of such a refusal the terms of a contract.

The government argues that the allegations of the indictment cannot be so narrowly construed. They must be viewed in the light of all the facts charged, and, though

2. Cf. Edwards v. United States, 312 U.S. 473

such a provision in a contract may not be invalid on its face, the factual context in which it will work, its alleged purpose and ultimate effect cannot be ignored in determining its actual validity. Considering all these factors the government contends that the agreement was for the express purpose of committing the offense of violating the Sherman Act; that the gains in wages to the labor conspirators and in the profits to the co-conspiring manufacturers from their monopoly grip on the home builder and other consumers of such lumber products in the San Francisco area were not mere fortuitous and incidental results of the agreement; and that Congress in enacting the Norris La-Guardia Act did not intend that labor should be free so purposefully to conspire with its employers to exact a tribute from the consumers of their products.

We agree with the government that the charges of the indictment and the factual allegations made in their support are not of a restraint upon commerce merely incident to the ordinary disruption of the production of an employer, arising out of a protracted labor dispute and necessary to the achieving of a legitimate objective of organized labor. Rather there is here alleged a combination for a direct restraint upon commerce with an objective of destroying the competition of that commerce and permitting the fixing and maintenance of the local area prices at an arbitrary, artificial and non-competitive level. It is such intended restraints for such an objective at which the sanctions of the Sherman Act are directed.[3]

Nor are the appellants aided by the statement in the Apex case that the restrictive effect upon the power of an employer to compete in commerce by the elimination of price competition based on differences in labor standards, resulting from the successful consummation of a wage

3. See 28 Cal. L. Rev. (1940) 747, 759

agreement by a union, is not within the Sherman Act. Not only was the price competition of mill work and patterned lumber products of Washington and Oregon attributed in part to more efficient, technically improved, large scale methods, but here the elimination of competition was not a result merely incidentally flowing from the achieved objective of increased wages but the means of obtaining it. Also there is not here the protection or preservation of a previously existing interest lending reasonableness to a restraint, but rather the bold pursuit of restraint for the direct mutual advantage of the parties, to be gained by the monopoly price tribute from the consumer.

Because organized labor may lawfully strike, picket or boycott in support of its demands for higher wages which an employer may or may not be able to pay, it does not follow that labor and the employer may agree to use these weapons to destroy the competition of interstate commerce and give the employer a monopoly price raising contract and thereafter "split the take." Such conduct is not within the scope of the immunity described in the Apex case.

Likewise the monopoly purposes and objective of the agreement between the labor unions and the manufacturers distinguishes the conduct charged here from that held under the provisions of the Norris LaGuardia Act to be immune from prosecution in United States v. Hutcheson, supra. In that case the dispute was between two unions and the effect on interstate commerce was an incident to and not the objective of the defendants' conduct. That case clearly indicates that, as shown in the Apex case, there is an area of conduct of combined labor and capital violative of the Sherman Act which is not immunized from prosecution under the Norris LaGuardia Act. This appears in the statement of Mr. Justice Frankfurter's opinion, page 242, that "So long as a union acts in its self interest and

does not combine with non-labor groups,[4] [footnote 4 below] the licit and the illicit under § 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means."

In United States v. Brims, 272 U.S. 549, so cited in the Hutcheson case, the Supreme Court held violative of the Sherman Act a conspiracy of manufacturers of mill work, building contractors, and union carpenters, to check competition from non-union made mill work coming from other states, to accomplish which the manufacturers and contractors were to employ only union carpenters, who would refuse to install the non-union mill work. This combination of labor "with non-labor groups" so held to violate the Sherman Act even lacked the element here charged of the enforcement of the employers' artificial and non-competitive price list, circulated to the trade and forced upon the consumer by the picketing and work-stoppages of the unions. There the conspirators, the Supreme Court states, (page 552) "wished to eliminate the competition of Wisconsin and other nonunion mills which were paying lower wages and consequently could undersell them. Obviously, it would tend to bring about the desired result if a general combination could be secured under which the manufacturers and contractors would employ only union carpenters with the understanding that the latter would refuse to install nonunion made millwork. And we think there is evidence reasonably tending to show that such a combination was brought about, and that, as intended by all the parties, the so-called outside competition was cut down and thereby interstate commerce directly and materially impeded. The "local manufacturers,

4. Cf. United States v. Brims, 272 U.S. 549, involving a conspiracy of mill work manufacturers, building contractors and union carpenters.

relieved from the competition that came through interstate commerce, increased their output and profits; they gave special discounts to local contractors; more union carpenters secured employment in Chicago and their wages were increased. These were the incentives which brought about the combination. The nonunion mills outside the city found their Chicago market greatly circumscribed or destroyed; the price of building was increased; and, as usual under such circumstances, the public paid excessive prices."

In the four cases[5] succeeding United States v. Hutcheson, in which the Supreme Court sustained, without opinion, the dismissals of the indictments, there is a charge of a purpose to restrain interstate commerce, but in no one of them does it appear that the labor dispute is ended and emerging from it are monopolies, previously purposed and intended, in which both labor and employer successfully divide the gain from the price raising of the combination. In three of them the combination is between labor groups alone. In one, United States v. Carozzo, 313 U.S. 539, the Supreme Court sustained the district court (37 F. Supp. 191, 193) which had dismissed the indictment in which it was charged that the combined labor unions "by means of strikes and threats of strikes . . . force paving contractors in the Chicago area to enter into working agreements with the defendant Council requiring paving contractors using truck mixers in the Chicago area to employ the same number of men which they would employ if truck mixers were not used; . . ."

Here is no allegation of a combination of unions and employers to restrain interstate commerce such as is referred to in the opinion in the Hutcheson case. If there be

5. United States v. Building & Construction Trades Council, 313 U. S. 539; United States v. Carozzo, 313 U. S. 539; United States v. International Hod Carriers, etc. Council, 313 U. S. 539; United States v. American Federation of Musicians (47 F. Supp. 304) 318 U. S. 741.

an impediment to the interstate commerce in truck mixers of concrete by so forcing the employers to the extra expense of mixing concrete by hand labor, it is, as stated in the opinion of the district court "only indirect and incidental," and as that opinion also states "In the instant case no acts were alleged to have been performed which would constitute restraint of trade in commercial competition in the marketing of truck mixers." 37 F. Supp. 196. Furthermore, the coercion of the employers is against the employers' interest and solely for the interest of the union members. The situation is strikingly different from one where the agreement between employers and unions for the exclusion of the articles from outside the state is purposed at once to raise prices by monopoly pricing and create an increased wage by such pricing.

Here the Manufacturer Group and the Union Group are no longer "participating in or interested in a labor dispute" as that term is used in § 5 of the Norris La Guardia Act.[6] The dispute is past. The labor and non-labor groups are combined. The acts described in § 4 of that Act[7] and section 20 of the Clayton Act,[8] some of which

---

6. "No court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in section 4 of this title." 29 U. S. C. § 105.

7. "No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

are charged in the indictment here to have been committed by the now non-disputant unions and their members and their manufacturing employers are not to secure any legitimate advance of the laborer's interest. They are squeezing implements to extort what, in effect, is a capital levy on the home builder and other consumers. Their lack of organization makes them helpless to defend themselves against the monopolistic conspirators.

We hold that Congress in enacting the Norris LaGuardia Act and the Clayton Act did not give immunity to the "wrongness" and the "illicit" of this character of combination of labor with non-labor groups. The district court committed no error in overruling the demurrers and in refusing to dismiss the indictment.

It is contended that the trial court erred in denying the defendants' motion for a directed verdict in that there was

---

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 3 of this title." 29 U. S. C. § 104.

8. 38 Stat. 738, 29 U. S. C. § 52. "No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

"And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor; or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States."

insufficient evidence to support the charges of the indictment. But in reviewing the record we find evidence of agreements between the two groups and conduct on the part of each directed at the elimination of competition from the northern products by the price control and other acts from which a jury well could find a concert of action and purpose to unlawfully restrain interstate commerce. Therefore, the trial court did not err in submitting the case to the jury.

Appellant United Brotherhood of Carpenters and Joiners of America does not argue here the question of the sufficiency of the evidence to support the charge that some form of agreements existed between the local labor groups and the employer group or that they may have had as their objectives the suppression of commerce. But it does raise, separately, the issue of whether there was evidence of its knowing of or being a party to the found combination or conspiracy.

There was evidence showing knowledge and participancy by the president, vice-president and field representative of the international in the negotiation of working agreements in the Bay area between the local organizations and the mill operators. There was also evidence of approval of those agreements by those officers acting in their capacity of final arbiters of problems or differences which might arise between locals. We cannot say there was nothing upon which the jury could find this appellant, through its authorized agents in pursuit of its accepted policy, was a party to the combination.

The Alameda County Building and Construction Trades Council attacks the sufficiency of the evidence as to it in the same manner. We find ample evidence of the Council aiding in the enforcement of an agreement to exclude certain types of lumber and determining whether certain dealers should be placed on the unfair list for violating the

agreements from which the jury could find participation in the conspiracy. The trial court did not err in refusing an instructed verdict for this appellant.

Error is claimed by two of the defendants, Christian A. Wilder and Charles Gustafson, both of the Manufacturer Group, in the trial court's overruling of their plea to its jurisdiction and in rendering judgment and imposing sentence on them. The grounds urged are that they, as individuals, had not been indicted by a grand jury. Rather, it is contended, only the firms of which they are partners had been indicted.

Paragraph 8 of the first count of the indictment states, in part, "The following named individuals, partnerships and corporations . . . are hereby indicted and made defendants herein . . . The legal status and principal place of business or residence of the owners are listed below." There then follows a page set out in five columns. In the first of these are listed eight names of business houses. The second column lists "Legal Status," i.e., corporation, partnership, individuals. The third column lists "Names of partners or individuals," and included among the names under the heading are those of Wilder and Gustafson.

It requires no strained construction to find the obvious. Clearly those two defendants were included among the "following named individuals" who were indicted. The trial court did not err in its ruling on their pleas and motions.

Appellants of Local No. 42 and Local No. 550 of the United Brotherhood of Carpenters and Joiners assert that the trial court erred in sustaining the government's demurrer to their pleas founded on an alleged immunity said to arise out of the forced production of subpoena duces tecum of the records and documents of these unions by the grand jury. This contention has been foreclosed by the recent decision of the Supreme Court in United States v. White, U.S. , decided June 12, 1944.

Like error is claimed by appellants Ryan, O'Leary and Helbing, who were officers or business agents of the Locals or Councils indicted. Pursuant to subpoenas duces tecum addressed to their organizations, these men appeared before the grand jury and, under protest, produced the desired organizational records and documents. It is clear from the decision in the White case that these defendants could not claim a personal immunity arising out of the production of documents held in their custody in an official capacity.

However, in addition to their producing union books and papers, each was forced to testify before the grand jury. The question is then raised as to whether their testimony concerned in a substantial way their own connections with the transactions for which they were subsequently found guilty as charged. Heike v. United States, 227 U.S. 131, 144. The trial court found no such substantiality and concluded they were not immune from prosecution under 15 U.S.C.A. § 32.

The transcript of their testimony given before the grand jury is included within the record now before us. Ryan v. United States, 128 F. 2d 552 (CCA-9). It shows that each identified the organizational records produced; that each was an officer or agent of his respective union, and that each outlined the organizational structure and relationships between the several unions. None of such testimony is within the area of immunity. United States v. Greater New York Live Poultry C. of C., 34 F. 2d 967 (D.C.N.Y.), cert. denied.

The grand jury transcript further shows that Ryan identified as being his own a signature on a contract dated September 21, 1926. He was then asked, "Do you recall the circumstances under which that contract was negotiated . . .?" and answered by describing how conference committees chosen by the parties, the unions and employ-

ers, negotiated such agreements. The next question was, "Now, in connection with the contract I have just handed you, . . . did you personally sit in at these negotiations?" to which he answered "Yes."

True, that identification by an officer of his signature on a contract entered into by his organization may not have sufficient relationship to the investigated transaction to warrant granting immunity. Cf. United States v. Minoise Alcohol Co., 45 F. 2d 145, 149 (CCA-2). Certainly the description of the methods of negotiations in themselves are not within the protected area. Where an individual is required to answer whether he participated in the negotiations of a contract a clause of which is subsequently set forth in an indictment found against him charging its operation to be one of the means "of effectuating . . . [an] . . . unlawful combination and conspiracy," it cannot be said that his testimony has no substantial bearing on a transaction and its criminality founded on merely some imaginary hypothesis. Ex parte Irvine, 74 Fed. 954, 960; Mason v. United States, 244 U.S. 362, 365; United States v. Molasky, 118 F. 2d 128, 134 (CCA-7); Doyle v. Hofstader, 257 N.Y. 244, 177 N.E. 489. Proof of this portion of the contract was treated by the government as one of the vital links in the chain of evidence summing up the existence of a conspiracy to restrain trade, cf. United States v. Murdock, 284 U.S. 141, 150, and acknowledgment of having participated in its negotiations would "tend" in rather a strong sense to incriminate him. United States v. St. Pierre, 132 F. 2d 837, 838 (CCA-2). That the contract on its face may have been lawful, United States v. Weisman, 111 F. 2d 260, 262 (CCA-2), or that the defendant signed it in an official capacity cannot be said to destroy his immunity as an individual in all circumstances.

Appendix A

As to appellant O'Leary, in addition to identifying to the grand jury union documents explaining entries in the minute books, describing the labor conditions prevailing during the period of the conspiracy, negotiations over wages, he was asked if he worked in a "Negotiating Committee" made up of union representatives and employer representatives which worked on a stabilization agreement. He answered in the affirmative. Further testimony before the grand jury, warranting him immunity is stated in the footnote.[9]

Regarding the testimony of appellant Helbing before the grand jury, information of negotiations between the unions and the employers similar in kind to that of O'Leary was given. In addition he was asked if he knew a Mr. Jones of Jones Hardwood Company. He answered, "I have spoken to the gentleman."

---

9. O'Leary was further asked: "Now, referring to the minutes of January 13, 1939, I notice that it states, 'Business Agent O'Leary reported checking over the sidings and freight sheds and mills during the week and not finding any hot mill work.' Do you recall the circumstances surrounding your activities as mentioned in this excerpt from the minutes?" Answer "Yes." Then the following questions and answers were put and given.

Q. "Would you state them to the Grand Jury?"

A. "Well, every once in a while somebody will break out with a rash over there that there is a hell of a lot of non-union mill work coming in from the North——."

Q. "That is, from Washington and Oregon?"

A. "Yes, I guess they don't come in from British Columbia, and they want to know what the hell the business agent is doing.—'How are we going to live and work here if that cheap work comes in?' And naturally enough, they want me to go out and check on it."

Q. "When you go out and check, what do you do?"

A. "Go around to all the sidings and look them over, and see if there is any cars setting on them, and see what is in them."

Q. "If you find that there is any so-called 'hot mill work' in any cars on any of these sidings, what do you do then?"

A. "Go to the employer, or the man that is purchasing them and try to get him to use local made mill work.—Now, in using the word 'mill work' it has to do with moldings—there was a time when all surfaced material used to bear the label, and the carpenters would not handle it unless it did. At present, why, four-side stuff can come in; we don't bother about it, but if there is moldings comes in we object to it."

Appendix A

Q. "As a matter of fact, you called on him, didn't you and asked him to put up one of those placards that the Grand Jury has seen here?"

A. "He asked me first—he sent me a letter in reference to certain things and conditions, and I went down to see Mr. Jones."

Q. "And you asked him at that time to put up a placard didn't you?"

A. "Yes, to boost local material."

Q. "Now, do you recall some doors that were coming in for a Kerry Building job down here, from a concern in Washington?"

A. "No, I can't recall that."

Q. "You don't? Don't you recall that Mr. Jones had ordered some doors from this concern in Wisconsin and that he couldn't bring them in here?"

A. "No, he was given concessions—I didn't transact that particular part of it. There were two of us on the job here, part of the time last year."

Q. "Do you recall Mr. Helbing, that due to the fact that this company in Wisconsin did not have the label, that Mr. Jones obtained certain letters from them stating that they were fully organized A. F. of L. with their local union number on those letters? Do you recall that?"

A. "No, I don't. What I did tell Mr. Jones was this, when he asked me the question in reference to those doors. I said, 'When the time arrives, when you have doors coming in here, why, we will take it up.'"

Among the objects of the conspiracy alleged in the indictment was the exclusion of mill work and patterned lumber manufactured in states other than California. Among the means and methods alleged was "defendants . . . by means of pickets and threats to picket, forced the Jones Hardwood Company of San Francisco to cancel an order for mill work and patterned lumber from the Roddis Lumber and Veneer Company of Marshfield, Wisconsin . . ."

Appendix A.

At the trial the government introduced a letter addressed to Helbing's local in which the Jones Hardwood Company inquired whether there were restrictions on certain doors manufactured in Wisconsin. During the course of the government's cross-examination of Helbing he was again interrogated regarding his conversations with Jones.

Apart from O'Leary's and Helbing's participation in the negotiations between the unions and the manufacturers, it is clear that the grand jury questions bearing on their own conduct relating to the exclusion of the out-of-state products coming into the area had a very substantial relationship to the transactions found to restrain commerce and a direct tendency to incriminate them if other facts were found. To subpoena a person to appear and testify before a grand jury investigating possible unlawful restraints on interstate commerce and then force him to answer in what manner he kept articles of such commerce from being sold, certainly is to invade the area of incrimination and raise the immunity granted by 15 U.S.C.A. § 32. The trial court erred in refusing to dismiss the indictment as to these three defendants.

Those appellants who pleaded not guilty and were tried excepted to certain instructions such as the following:

"In this case the question is whether the labor union defendants entered into a combination with the non-labor defendants whereby the defendants intended to or did bring about an undue restriction of or interference with interstate commerce in mill work or patterned lumber."

"If you find that the employer and labor union defendants entered into an agreement or understanding, oral or written, under the terms of which the employer defendants agreed not to purchase patterned lumber and mill work manufactured under a lower wage scale than that prevailing in the San Francisco Bay Area, including patterned lumber and mill work manufactured in States out-

side the State of California; . . . such an agreement or understanding would constitute a violation of the Sherman Act as charged in the indictment. It would constitute no defense under the law, either to the employer defendants or to the union defendants that the agreement or understanding may have been arrived at in settlement of a labor dispute; . . ."

These instructions were covered by an overall instruction based upon the rule stated in the Hutcheson case. It is "Labor unions or their members may join together in promoting their self-interest, even though their acts in so doing may result in an undue obstruction of interstate commerce. But they can do this only so long as they act in their self-interest and do not combine with non-labor groups." There is abundant evidence convincing to us as well as to the jury, that the unions did not confine their efforts to promoting their self-interest but combined with the employers, creating a monopoly excluding mill work from other states, for their employers' interest as well. We find no prejudicial error in the instructions.

The judgment against all the appellants, save Ryan, O'Leary, and Helbing is affirmed. As to the latter three, the judgment is reversed and as to them their immunity requires that the indictment should be dismissed.

Affirmed in part and reversed in part.

(Endorsed:) Opinion. Filed Aug. 23, 1944. Paul P. O'Brien, Clerk.

APPENDIX B

Opinion of the Circuit Court of Appeals for the Second Circuit, Oct. 12, 1944

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 339—October Term, 1943.

(Argued May 10, 1944 Decided October 12, 1944.)

ALLEN BRADLEY COMPANY, *et al.*,
Plaintiffs-Appellees,

—*v.*—

LOCAL UNION NO. 3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, *et al.*,
Defendants-Appellants.

Before:

SWAN, AUGUSTUS N. HAND and CLARK,
Circuit Judges.

Appeal from the District Court of the United States for the Southern District of New York.

Action by Allen Bradley Company and ten other companies manufacturing electrical equipment against Local Union No. 3, International Brotherhood of Electrical

Appendix B

Workers, and six named persons individually and as officers or agents of the Union, for an injunction and declaratory judgment of illegality of certain alleged union activities. From a judgment for the plaintiffs, 51 F. Supp. 36, upon report of a special master, 41 F. Supp. 727, the defendants appeal. Judgment reversed and action dismissed.

HAROLD STERN, of New York City (George Rosling and Saul Pearce, both of New York City, on the brief), for defendants-appellants.

WALTER GORDON MERRITT, of New York City (McLanahan, Merritt & Ingraham, Burgess Osterhout, and Hyler Connell, all of New York City, on the brief), for plaintiffs-appellees.

CLARK, *Circuit Judge*:

Defendants, Local Union No. 3 of the International Brotherhood of Electrical Workers, American Federation of Labor, and certain of its officers, appeal from an order of the district court enjoining various activities of the union and declaring them to be a conspiracy in restraint of trade in violation of the Sherman Antitrust Act, 15 U. S. C. A. § 1, *et seq.*, and laws amendatory thereof. The enjoined activities constitute in sum any and all actions on the part of the union which would tend to boycott from the New York City area market electrical equipment manufactured by the various plaintiffs.

Plaintiffs filed their complaint below in December, 1935. The following year most of the plaintiffs joined in a companion suit against the union, and additional defendants, for treble damages at law under the Sherman Act; and

this has remained pending in the district court without trial. The parties agreed to refer the present action to a special master for determination of "all issues of law and fact," and it was so ordered. After two and one-half years of hearings, at which, as the master states, more than 400 witnesses were examined, some 1,700 exhibits were presented, and some 25,000 pages of testimony adduced, he filed an opinion, October 2, 1941, in which he discussed the facts and the law, concluding that the plaintiffs should have judgment, and asked the parties to submit proposed findings of fact and conclusions of law, 41 F. Supp. 727. The parties having complied, the master, on November 23, 1942, filed his final report, containing lengthy findings and conclusions, which, upon cross-petitions to confirm and dismiss, the court below confirmed with some limited alterations and additions to the findings. 51 F. Supp. 36. The final decree, covering 121 printed pages of the record, included these findings, 374 in number, with 26 conclusions of law, as well as the form of injunction to be issued, and the declaratory judgment declaring "that the combination and conspiracy and the acts done and being done down to the date of the conclusion of the taking of testimony herein before the Special Master, in furtherance thereof, all as set forth in the findings of fact as made and adopted by the Court herein, are unlawful and contrary to" the Sherman Act. This appeal is taken upon only the findings and judgment, and hence does not seek any modification of the facts found.[1]

---

1. These union activities appear to have been in other litigation in the court below. They were the subject of four indictments against the union and its officers and others under the Sherman Act, which were sustained upon demurrer as not involving a "labor dispute" within the statutory exemption hereinafter discussed. *United States* v. *Local Union No. 3*, D. C. S. D. N. Y., 42 F. Supp. 783; *United States* v. *New York Electrical Contractors Ass'n*, D. C. S. D. N. Y., 42 F. Supp. 789; *cf.* 42 Col. L. Rev. 1067, 40 Mich. L. Rev. 1244. The court records show, however, that petitions for reargument were filed by defendants after the decision in *United States* v. *American Federation of Musicians*, 318 U. S. 741, discussed below; and thereafter on September

Appendix B

The eleven plaintiffs in the action are manufacturers of electrical equipment whose factories are located for the most part without the New York City area. Several operate under collective bargaining agreements with local unions in their localities. Local 3 is the powerful local for the five boroughs of New York City of the International Brotherhood of Electrical Workers, itself one of the most influential members of the American Federation of Labor. Local 3 possesses approximately 15,000 members, divided into numerous separate classifications. Charter A members, numbering around 7,000 consist generally of journeymen electricians engaged in the fabrication and installation of electrical equipment, while Charter B members, numbering around 8,000, are largely employees of local manufacturers producing electrical equipment. Sole voting power rests in Charter A members, and Charter A membership is entailed for sons and brothers of existing members. Prior to 1928, Local 3 was composed only of the present Charter A members; but the membership now covers virtually everyone working on or producing electrical equipment in any way within the area. Although there are other officers and an executive committee, the nerve center of the union rests in the office of the business manager, who, among other things, has the complete power to select which members shall fill existing job vacancies.

The acts constituting the alleged conspiracy in restraint of trade which resulted in the boycott of plaintiffs' products are all elements of an extensive campaign under-

22, 1943, the cases were *not pressed*. Slightly earlier a union affiliated with the C. I. O. sought an injunction forbidding its boycott by Local Union No. 3, the International Brotherhood of Electrical Workers, and others, and basing its action upon claimed rights under the National Labor Relations Act; but it was unsuccessful. *United Electrical, R. & Mach. Workers* v. *I. B. of E. Workers*, 2 Cir., 138 F. 2d 488, affirming D. C. S. D. N. Y., 30 F. Supp. 927; *cf.* 54 Harv. L. Rev. 513; Boudin, *Representatives of Their Own Choosing*, 38 Ill. L. Rev. 41, 47. The master's opinion herein is discussed in 28 Va. L. Rev. 554 and 5 U. Det. L. J. 132.

taken by Local 3 to organize the electrical industry in New York City. This occurred with the appointment in 1934 of a new business manager, Harry Van Arsdale, Jr., after the depression years of 1931 to 1934 had left building at a standstill in New York City and found the union with only a quarter of its members employed. Thereafter year by year, as the master reports, Van Arsdale fought for, and gradually obtained for the union members, a reduction in the number of hours of work per week at the basic rate of compensation, as well as an increase in the rate of compensation. Meanwhile the membership of the union greatly increased, so that it was highly successful in unionizing and in obtaining closed-shop agreements in both the local manufacturing and the local contracting branches of the electrical equipment industry. The findings then show that "agreements and understandings" entered into by three groups—manufacturers, contractors, and union—gave them a complete monopoly which they used to boycott the equipment manufactured by the plaintiffs.

While the boycott as found ran the gamut of electrical equipment from highly complicated switchboards and control devices down to novelty lamp shades, the case of the modern switchboard is offered as typical. There are in New York City a number of companies manufacturing switchboards who, before these activities of Local 3, shared an open competitive market with many of plaintiffs. In return for a closed-shop agreement calling for higher wages and shorter hours for employees, however, Local 3 promised these local companies an exclusive market for switchboards within the city, so that they could name their own prices to offset increased production costs. Local 3 carried out its promise with the help of the electrical contractors. It had already won closed-shop agreements from a vast majority of the latter through a series of strikes, threatened strikes, and sympathetic strikes by other unions

in the building trade, which threatened to tie up all construction work in New York City. It now secured the further terms that union members should work only on switchboards of local manufacture by union shops, and that the contractors should have the sole power to buy materials for any job, with a proviso as additional protection that only products bearing the union label would be utilized. Like the manufacturers, the contractors were not averse to the extra expense of union material and labor, when all competition was thus removed from the field.

The contractors, however, went so far as to organize a voluntary Code of Fair Competition, which stipulated that every contractor should file with the code committee (upon which two officials of the union sat) every bid made by him on any work authorized in New York City, that he must include in his bid 35% of the labor cost for overhead, 10% of the materials' cost for commission, and 6% of the total for management, with price cutting penalized by substantial fines. This code was a part of the union contract with several contractor associations in 1935, but it was disapproved by the International President of the I. B. E. W. and the record is not entirely clear whether thereafter it remained a part of the union contract until the contractors themselves gave it up in 1939.[2] At any rate, it is found that the union filed no complaints under the code and did not share in the fines or itself take any action against a contractor or cause its members to refuse to stay in the employ of disciplined contractors.

In other fields, with respect to other items of electrical equipment, a similar situation was found to prevail. Only when no local unionized manufacturer made an article was its use permitted; and in such cases, if at all feasible, it

2. The master's opinion states only that there was a sharp conflict in the evidence; the findings, however, are general and conclusory to the effect that the union was bound by the code.

was required either that the article come from the manufacturer "knocked down," to be put together by union labor, or that the finished article be unwired and rewired upon receipt. For years it has been more economical for the manufacturer to wire at the factory such articles as lighting fixtures and control equipment; but the union required the wiring to be done by its own members on the job, even though, in the case of control equipment, the manufacturer had to complete the wiring before shipment for testing purposes. Curiously, a similar requirement was also in force with regard to some equipment manufactured by Local 3 members in closed Local 3 shops. Switchboards, for example, had to be "knocked down" at the factory and reassembled at the job.

All in all, the situation disclosed by the findings is that of an entire industry in a local area, quite dominated and closed to outsiders by a powerful union, whose members receive as a result exceedingly higher wages, shorter working hours, and improved working conditions, and whose copartners—the local manufacturers and contractors—also gain by the greater profits achieved through the stifling of competition. This has been accomplished by the traditional labor weapons of refusal to work upon disfavored goods, with peaceful and non-violent[3] persuasion, picketing, and blacklisting, and now the active participation of the local employers. The boycott, however, is virtually complete against manufacturers, such as plaintiffs, who have no working agreements with Local 3. It makes no difference that most of plaintiffs are located without the jurisdiction of Local 3 and hence could never

3. The absence of violence is significantly emphasized by the finding that "Local No. 3 has encouraged disorder and lawlessness on the part of its members in connection with the above activities by guaranteeing them bail and counsel furnished at the expense of the union in case of their arrest" and has so spent sums for bail and counsel fees for members, as well as by a specific finding that there was no evidence of any violence or any threat of violence against any of the plaintiffs by any of the defendants.

bargain collectively with it in any event, or that some of plaintiffs are already working under harmonious agreements with other unions. Moreover, as must be expected in cases where a local area is thus closed to outside products, the persons injured will include not only the excluded manufacturers and rival unions, but also—at least initially and very likely continuously—the consuming public, which must pay higher rates (as, indeed, it must also for raising of wages and lowering of hours of work) and does not receive the benefits of improved machinery or methods of operation. Thus it appears that general electrical work and equipment are costly in New York City, and instances are cited where equipment of plaintiffs was turned down for local equipment with the union label at twice or three times the cost. Since the lowest bidder no longer gets city contracts, if it be not a union bid, the city has lost federal grants, which were premised upon acceptance of the lowest bid. An outstanding example of the consequences from this type of economic warfare to third persons is that of one local manufacturer which has two price lists for its products, one for union use within the city at more than twice the price of the other for use without the jurisdiction.

This is only a brief, but, as we believe, a presently adequate, summary of the many pages of record devoted to a statement of the facts. The industry of counsel and of the special master is to be commended; but we are constrained to say that the very verbosity and superfluity of the findings have not aided decision as much as doubtless had been expected. We have had occasion to point out recently that findings, prepared after decision by winning counsel, even though accepted by the court, are not as helpful as the trier's own original views; and this is particularly true when the findings are lengthy and repetitious. *Matton Oil Transfer Corp.* v. *The Dynamic*, 2 Cir., 123 F. 2d 999,

1001; *United States* v. *Forness*, 2 Cir., 125 F. 2d 928, 942, certiorari denied *City of Salamanca* v. *United States*, 316 U. S. 694; *Petterson Lighterage & Towing Corp.* v. *New York Central R. Co.*, 2 Cir., 126 F. 2d 992, 996; *cf.* Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States, 1944, p. 59. Here there is an added difficulty in the incorporation of all the findings in the judgment and their inclusion by express statement in the declaration of invalidity and by implication in the prohibition of the injunction. Doubtless this was done to satisfy requirements that an injunctive order must set forth the reasons for its issuance and describe in reasonable detail the acts to be restrained, Federal Rule 65(d), continuing 28 U. S. C. A. § 383, *cf.* 29 U. S. C. A. § 109; but a multiplicity of words is as little revealing as a dearth of words. Labor union officers and members are entitled to a more direct and succinct statement of the illegalities of which they are held guilty and which they must cease under penalties of fine and imprisonment. This basic requirement assumes the greater importance here because the course of decision below has left the case not free of ambiguity on a crucial feature. For, as we shall point out, recent decisions have conceded labor unions quite broad powers to refuse to work and to employ peaceful persuasion, but have left open the effect of combinations or conspiracies of unions with non-union elements, particularly for non-union objectives. Thus the nature and purpose of the conspiracies here may quite possibly be the crux of the case.

This ambiguity as to the importance here of the element of conspiracy with non-labor groups—as against other more traditional labor-union activities—apparently stems from a real change in emphasis as the case progressed. Indeed, such a change was but natural, if not necessary, because of the complete reversal of the controlling judicial precedents during the long pendency of this litigation.

Appendix B

In the original complaint of 1935 the stress is on union power which has forced the contractors to employ only union labor and "through their [defendants'] said control over said electrical contractors" has coerced the latter not to purchase electrical equipment wired or assembled wholly or partly by non-union men outside the Metropolitan Area. And the prayer for injunction—important because it is, except for limited additions hereinafter noted, the injunction ultimately granted—was against the inducing of persons not to work upon plaintiffs' products, with no direct prohibition of conspiring with non-union groups and indeed no reference to such groups unless possibly under the vague term "confederates." Significantly, no non-union co-conspirator was joined as a party defendant and none has since been added. The expanded amended complaint of 1937 does set forth at considerable length allegations of contracts with the electrical contractors who, however, were said "to have been and now are, forced, compelled and coerced by Local 3 to enter into" these contracts for the conduct of their business in the Metropolitan Area and restricting their choice as to the manufacturers from whom they would make their purchases of electrical equipment. And the requested form of injunction remained as in the complaint. The master's opinion stressed the union's economic power, which had not merely obtained higher wages and shorter hours of labor, but had brought submission and then complaisant and active participation from the local employers. The voluminous findings filed in 1942 make much more of the conspiracy, or conspiracies; and several conclusory findings allege an intent to give the local manufacturers and contractors power to control the market and the market price. The injunction as granted, however, accepts, with slight and unimportant changes of wording, the original eight subparagraphs as prayed for in the complaint, and merely adds two more: a 9th against making, carrying out,

or seeking to secure the observance "of agreements or understandings with contractors, manufacturers, or others, restraining, hindering or preventing" the purchase or use of plaintiffs' electrical equipment on the ground that it was not made in New York City or worked on by members of Local 3 or was in competition with equipment made by manufacturers employing members of Local 3; and a 10th against "any action whatsoever" hindering the purchase or use of plaintiffs' equipment on the same grounds as stated in the 9th. The broad scope of the injunction is such as to reach peaceful attempts by the defendants—among whom are included the individual officers of the union—to induce any person (thus even a union member) not to deal with plaintiffs, while it is most doubtful if the unnamed "confederates" are reached at all. *Cf.* Federal Rule 65 (d), *supra.*

Nevertheless, on any judicious view of the case, we do not believe the motive or intent of defendants can be at all in doubt; and we are left only to appraise its legal validity and effect. That the union and its officers were acting wantonly, corruptly, or even benevolently for the mere benefit of their copartners, and were not at all times acting for what they conceived to be the self-interest of the union and its members, is nowhere asserted, but is negatived by the general import of all the findings and explicitly by several, of which Finding 361 is typical. That finding, after stating that the defendants and those acting in concert with them were "in no way concerned with the working conditions, rates of wages or union affiliations of the employees in plaintiffs' factories outside the Metropolitan Area," continues: "The ban on the plaintiffs' products is and has been imposed and maintained by the aforesaid combination of the defendants, the local union contractors and the local union manufacturers, solely because the plaintiffs do not, or because of their geographical location outside the Metropolitan Area cannot, employ members of Local No. 3 in

their factories outside the Metropolitan Area." In other words it was a make-work campaign for the benefit of union members.

For half a century and against strong popular, political, and legislative pressure, the courts struggled to resolve the anomaly of applying a statute forbidding combinations in restraint of trade to a social organism which must depend on united effort for its existence and upon at least certain restraints of trade as a reason for its being. Finally, at long length the Supreme Court boldly announced what must be taken as an abandonment of the attempt. The case which most significantly marks this change is *United States* v. *Hutcheson*, 312 U. S. 219, 231, 236, where the majority of the Court through Mr. Justice Frankfurter made clear that the Sherman, Clayton, and Norris-LaGuardia Acts must be read together as "interlacing statutes" presenting "a harmonizing text of outlawry of labor conduct," and that "the Norris-LaGuardia Act reasserted the original purpose of the Clayton Act by infusing into it the immunized trade union activities as redefined by the later Act."[4]

4. This is one of the most discussed cases of recent times; compare, *inter alia*, Gregory, *The New Sherman-Clayton-Norris-LaGuardia Act*, 8 U. Chi. L. Rev. 503; Steffen, *Labor Activities in Restraint of Trade: The Hutcheson Case*, 36 Ill. L. Rev. 1; Nathanson and Wirtz, *The Hutcheson Case*, 36 Ill. L. Rev. 41; *Blum, Labor Provisions of the Clayton Act Revived*, 29 Geo. L. J. 779; Lippert, *Jurisdictional Dispute Between Labor Unions in Restraint of Trade—Immunity from Prosecution Under Anti-Trust Laws*, 4 U. Det. L. J. 209; Carey, *The Apex and Hutcheson Cases*, 25 Minn. L. Rev. 915; Teller, *Federal Intervention in Labor Disputes and Collective Bargaining—the Hutcheson Case*, 40 Mich. L. Rev. 24; Stockham, *The Hutcheson Case*, 26 Wash. U. L. Q. 375; Notes, 27 Va. L. Rev. 835; 41 Col. L. Rev. 532; 9 Geo. Wash. L. Rev. 724; 3 La. L. Rev. 646; 89 U. Pa. L. Rev. 827; 10 Fordham L. Rev. 268; 26 Iowa L. Rev. 862; 54 Harv. L. Rev. 887.

Among helpful discussions of the general problem may be cited Gregory, *The Sherman Act* v. *Labor*, 8 U. Chi. L. Rev. 222; Cavers, *Labor* v. *The Sherman Act*, 8 U. Chi. L. Rev. 246; Schmidt, *Application of the Antitrust Laws to Labor—A New Era*, 19 Tex. L. Rev. 256; Newman, *Restraint of Trade: Labor Disputes and the Sherman Act*, 2 Calif. L. Rev. 399; Tunks, *A New Federal Charter for Trade Unionism*, 41 Col. L. Rev. 969; Gregory, *Union Peacetime Restraints in Collective Bargaining*, 10 U. Chi. L. Rev. 127; Comment, *Labor Activities under the Sherman* Act, 35 Ill. L. Rev. 424.

Hence the test of lawful union activities in the famous Section 20 of the Clayton Act, 29 U. S. C. A. § 52—which had been held merely declaratory of existing law in decisions such as *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, 16 A. L. R. 196—is now to be given full effect, contrary to the holdings of the earlier cases, as stating permissible union activities in any "labor dispute" within the broad definition of that term of the Norris-LaGuardia Act, 29 U. S. C. A. § 113, as applied in cases such as *Milk Wagon Drivers' Union* v. *Lake Valley Farm Products, Inc.*, 311 U. S. 91, and *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U. S. 552. Hereafter, following the terms of these Acts, it can no longer be considered illegal for any person or persons, singly or in concert, to cease or refuse to perform any work or labor or peacefully to persuade any person to work or abstain from working, or to cease to patronize any party to such a dispute, or to recommend, advise, or persuade others by peaceful and lawful means so to do. 29 U. S. C. A. §§ 52, 104. And a labor dispute includes, *inter alia*, "any controversy concerning terms or conditions of employment * * * regardless of whether or not the disputants stand in the proximate relation of employer and employee"; and a case grows out of a labor dispute when it involves persons engaged "in the same industry, trade, craft, or occupation; or have direct or indirect interests therein," whether it is between employers and employees, or employers and employers, or employees and employees, or associations of each, or when it involves "any conflicting or competing interests" of persons "participating or interested" in the dispute. 29 U. S. C. A. § 113.

That the Court is now settled in its present view of the inapplicability of the Sherman Act even to labor controversies whose most injurious effects may be to others than the immediate parties is made clear by later important and unanimous decisions. The *Hutcheson* case itself immunized

against prosecution under the Act a strike and boycott against a brewery company arising out of a jurisdictional dispute between two unions as to building construction work being done for it and for its adjoining tenant. Shortly thereafter the Court affirmed dismissals of other indictments, in *per curiam* opinions which merely cited the *Hutcheson* case. *U. S.* v. *Building & Construction Trades Council*, 313 U. S. 539; *U. S.* v. *United Brotherhood of Carpenters & Joiners*, 313 U. S. 539; *U. S.* v. *International Hod Carriers', etc., Council*, 313 U. S. 539, affirming *U. S.* v. *Carrozzo*, D. C. N. D. Ill., 37 F. Supp. 191. The latter case is particularly instructive because, as the opinion below shows, it involved a charge of conspiracy as against unions and their members to prevent the sale and use in the Chicago area of labor-saving machinery (truck mixers) or in the alternative to force the employment of the same number of workmen as before the use of the machinery. Further, the defendants were charged with having obtained "working agreements" with the Chicago contractors to this effect. Finally in the controlling case of *U. S.* v. *American Federation of Musicians*, 318 U. S. 741, the Court affirmed the dismissal in D. C. N. D. Ill., 47 F. Supp. 304, 305, of an action for an injunction brought by the United States against a nation-wide boycott by musicians and their union of recorded music supplanting their services; it did this merely on citation of the Norris-LaGuardia Act and the *New Negro Alliance* and *Milk Wagon Drivers' Union* cases, *supra*. In this case the union comprised "virtually all musicians in the nation who made music for hire"; and it was charged not only with conspiring to prevent the use of "canned music" by radio broadcasting stations, in juke boxes in various establishments, and in the home, but also with accomplishing its purposes through coercion exercised on the record-making companies by notifying them that the union members would

not make musical records. Of course, the union was not interested in the working conditions of the employees of the record manufacturers or the radio stations, but was interested in providing work for its members; and it enforced its boycott in a *national*, not in a purely local, market.[5]

These cases, as well as earlier one,[6] are too closely similar to the case at bar, indeed going beyond it in some aspects, to permit the broad adjudication of illegality here and the injunction based upon it to stand. That this is a labor dispute within the statutory definition follows from the precedents. If a dispute as to the conditions of work between a union and employers still remains a labor dispute as to third persons interested therein or injured thereby, its complexion is hardly changed by a settlement —possibly only an armistice, not a treaty—between the original parties which hurts the third persons more than did the original controversy. *United States* v. *International Hod Carriers'; etc., Council, supra; Milk Wagon Drivers' Union* v. *Lake Valley Farm Products, Inc., supra,*

5. In *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, in denying recovery by a hosiery company for stoppage of its business by a sitdown strike, accompanied by violence, by non-employees of the company, Mr. Justice Stone, speaking for a majority of the Court, held that there must be a cessation of interstate traffic on a substantial scale, and that the purpose or intent of a union was not a decisive factor to a violation of the Act. This test of substantiality of the interruption of interstate commerce was not accepted as ultimately decisive, at least with respect to statutorily permitted labor activities, by the majority in the *Hutcheson* case, though Justice Stone still relied on it as the ground of his concurring opinion. Finally the *Musicians* case by the unanimous Court settled that an effective boycott on even a nationwide scale is not alone adequate.

6. Refusing to interfere, *e. g.*, with picketing by an organization for the advancement of the negro of a grocery discriminating against the employment of negroes: *New Negro Alliance* v. *Sanitary Grocery Co., supra,* or with picketing by a milk wagon drivers' union of retail stores selling milk, to reduce or eliminate milk deliveries from the dairies to such stores—of course to the direct benefit of the union members' employees, as well as the members themselves—*Milk Wagon Drivers' Union* v. *Lake Valley Farm Products, Inc., supra,* or with a sitdown strike by non-employees, *Apex Hosiery Co.* v. *Leader, supra,* note 5.

311 U. S. at page 99.[7] The decision in *Columbia River Packers' Ass'n* v. *Hinton*, 315 U. S. 143, 147, strongly relied on by the plaintiffs and the court below, is not to the contrary; for there the controversy was between a processor of fish on the one hand, and independent fishermen and their association, on the other. The Court emphasized that the defendants' desire was "to continue to operate as independent businessmen"; the dispute related "solely to the sale of fish," and hence was unlike those involved in earlier cases, where the employer-employee relationship was "the matrix of the controversy." The fact that some of the fishermen had a small number of employees who were also members of their association did not alter the essential nature of the controversy. So in *American Medical Ass'n* v. *United States*, 317 U. S. 519, 533-536, the professional association was interested solely in preventing the operation of a business conducted in corporate form by Group Health Association, Inc., not in the terms and conditions upon which the latter employed its physicians. Here, however, the defendant union is admittedly a bona fide labor organization; and the "conditions" of the employment of its members by the local manufacturers and contractors are "the matrix of the controversy," indeed the very thing which causes the plaintiffs their injuries.[8]

---

7. In the latter case the Court said that the controversy did not cease to be a labor dispute because the plaintiff dairies' employees became organized, for this merely transformed defendants' activities into a conflict which included a controversy between two unions—an aspect present in the case at bar, though not immediately before the court in this action. See note 1, *supra*.

8. *Cf. Donnelly Garment Co.* v. *Dubinsky*, D. C. W. D. Mo., 55 F. Supp. 587, 601; also 42 Col. L. Rev. 702, 1067; 56 Harv. L. Rev. 479; 10 U. Chi. L. Rev. 216. The more limited rule announced under the state statute in *Opera on Tour* v. *Weber*, 285 N. Y. 348, 136 A. L. R. 267, certiorari denied *Weber* v. *Opera on Tour*, 314 U. S. 716, is ably criticized by Lehman, *C. J.*, for the minority; and see also, *inter alia*, 41 Col. L. Rev. 1266, 42 Col. L. Rev. 51, 66-68, 51 Yale L. J. 144, 27 Corn. L. Q. 115, 39 Mich. L. Rev. 665 and 28 Va. L. Rev. 727.

It seems clear, therefore, that the union members may refuse to work upon the plaintiffs' products; and, in view of the position of economic power which the union has now attained, that privilege is for practical purposes an almost complete shield for the defendants' acts which are most injurious to the plaintiffs. For all the other acts charged against the defendants may be barred; and yet if the union can hold its ranks together and keep its members from working upon plaintiffs' products, the Metropolitan Area will still be closed to them. The injunction does not purport to interfere with that privilege directly, though it comes close to doing so in the provisions, clearly too broad, which forbid the union officers from inducing anyone, even members, from thus doing what it and they may legally do. Moreover, peaceful persuasion, even of others, is clearly within the now applicable statutory terms. Indeed, the injunction is so far contrary to the statute that its mandate might well have been stated in the converse of the terms of the Clayton Act, § 20, viz., as restraining Local 3 and its officers "from terminating any relation of employment, or from ceasing to perform any work or labor * * * or from ceasing to patronize * * * any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do." 29 U. S. C. A. § 52, *supra*. And the vague scope of the declaratory judgment is even more indefinitely inclusive, in terms reaching all the activities of the defendants set forth in the findings.

If the present judgment and injunction must therefore fall, should they be reframed to reach only the asserted conspiracies with the local manufacturers and contractors? Such a result would obviously call for the most discriminating draftsmanship, for the injunction, to make quite clear what was still permissible, to avoid all difficulties as to the extent of its reach in view of the failure to include the co-conspirators, and to define the objectionable union

purpose and intent which, rather than the consequences of defendants' acts, now would become crucial, though proof adequate to justify enforcement by way of contempt proceedings would be hard to secure. But more important is the fact that such an injunction, though on its face so seemingly far-reaching, would after all be of limited effect. For under it, compliance to the extent of public dissolution of all the agreements would satisfy the legal formalities; but still if the union continued its boycott of plaintiffs' products, conditions would remain substantially as before. Such an inconclusive result can hardly fail to add to the bitterness between the parties; one can easily foresee the almost impossible position of the court in attempting fairly to pass upon the proceedings in contempt which would inevitably follow. We do not think the precedents are correctly interpreted to require an effort so vain and useless.

The doctrine that a union necessarily forfeits the benefits of its statutory exemption from the antitrust laws when it combines with non-labor groups, which has been asserted by some authorities, is rested upon a reading in the most extensive form possible of a limitation noted by Mr. Justice Frankfurter to the doctrine stated in the *Hutcheson* case, as follows: "So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under § 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means." And then to the word "groups" he dropped a footnote, which reads: "*Cf. United States* v. *Brims*, 272 U. S. 549, involving a conspiracy of mill work manufacturers, building contractors and union carpenters." 312 U. S. at page 232. The *Brims* case affirmed the conviction of union members in the Chicago area who refused to work on non-union out-of-state mill work, with the result that an exclusive market

was established for the local manufacturers; and the argument is that by these words of the Court the *Brims* case is still left in unabated force.[9]

Now it is doubtful if Justice Frankfurter intended to define precisely just the extent of the limitation the Court had in mind. There was no necessity for him to do so at that time; and the matter had ramifications which the Court would not be likely to dispose of cavalierly. Hence the excepting sentence doubtless should not be read with exacting literalness; but in view of the use which has been made of it, we should note that if is not a positive affirmation, but a statement of only restricted reach. If its converse is to be accepted as an affirmative, it is not that combinations with non-labor groups are taboo, but only that when a union no longer acts in its self-interest and does so combine, then the licit and the illicit may have to be determined by a judgment as to the rightness or wrongness, etc., of the union end or purpose. Such a truism would seem still of undoubted validity; for the *Hutcheson* case did not purport to remove all rulings whatsoever upon labor activities. Thus, acts of violence are not protected by the statutes; nor, in any sound view, should labor union activities be usable merely as a blind or cloak for illegality. Thus, in *Albrecht* v. *Kinsella*, 7 Cir., 119 F. 2d 1003, 1004, 1005, the Court said: "Labor unions as such were here involved only in name—and the name of labor was being used as a shield or blind behind which a venal group was hiding and at the same time levying tribute upon industry.

9. The *Apex* case, *supra*, note 5, 310 U. S. at page 501, also cites the *Brims* case, but in like reserved language—"a case of a labor organization being used by combinations of those engaged in an industry as the means or instrument for suppressing competition or fixing prices." Early comments after the *Hutcheson* case, *supra*, note 4, were inclined to view the exception broadly; and there were some cases in accord, *e. g.*, *United States* v. *Central Supply Ass'n*, D. C. Ohio, 40 F. Supp. 964; *United States* v. *Associated Plumbing & Heating Merchants*, D. C. Wash., 38 F. Supp. 769. Later comment and decision have been more restrained, *cf.* note 10, *infra*.

business, and home builders. * * * When officials of the labor union step outside their union labor fields and act as highway men, levying tribute on those who wish to build homes or other buildings, acting for their individual gain, the immunity granted to labor unions under the amendment to the Sherman Act does not extend to them.". And the court went on to say: "The test is whether the activity complained of is one promotive of, and within the scope of, the legitimate objects of a labor union or whether the union is being misused by those holding official position or positions of trust therein, who, conspiring for their private and their personal profit, are using the union name to obtain immunity from Sherman Act prosecutions and at the same time shield their misconduct behind an organization whose fair name and activities are likely to mislead a court or jury as well as the public."[10]

---

10. See also *United States* v. *Bay Area Painters & Dec. Joint Com.*, D. C. N. D. Cal., 49 F. Supp. 733, 738, saying "it would seem beyond belief" that Congress, having carefully protected the machinery of collective bargaining, would then after the bargain has been made withdraw that protection and leave the parties liable for prosecution for criminal conspiracy, and distinguishing *United States* v. *Lumber Products Ass'n*, D. C. N. D. Cal., 42 F. Supp. 910, affirmed in part, 9 Cir., Aug. 23, 1944,—— F. 2d ——; and *cf. United States* v. *B. Goedde & Co.*, D. C. Ill., 40 F. Supp. 523, and comments in 9 U. Chi. L. Rev. 342 and 16 U. Cin. L. Rev. 51, and the earlier case of *Local 167.* v. *United States*, 291 U. S. 293. See also discriminating discussion in Gregory, *op. cit. supra*, note 4, 10 U. Chi. L. Rev. at pages 187-190; Tunks, *op. cit. supra*, note 4, 41 Col. L. Rev. at pages 1011-1012; 42 Col. L. Rev. 1067, 1070-1071; 40 Mich. L. Rev. 1244; *cf.* Merritt, *Two Federal Legislatures*, 30 A. B. A. J. 371, 380. Compare also the suggestion in Boudin, *Organized Labor and the Clayton Act*, 29 Va. L. Rev. 272, 395, that, when the union is used for the mere benefit of non-labor groups, then the union officers, and not the union, should be liable.

The *Lumber Products* case, *supra*, was an extensive prosecution of various trade associations, corporations, and individuals comprising the "Manufacturer Group," and various trade councils, unions, international and local, and officers and agents comprising the "Union Group" who were charged with having entered into a written agreement, following a demand in 1936 for a wage increase, to shut out from the San Francisco area all millwork and patterned lumber produced outside the area, although at least 80% had previously come from without the state, chiefly from Washington and Oregon. Indictments having been sustained, the "Manufacturer Group" pleaded *nolo contendere* and the union groups were found guilty by a jury

It seems to us that this is the distinction the Supreme Court had in mind in its reference to the *Brims* case, and that the latter cannot now be held as broadly applicable as perhaps it was originally. As one commentator puts it, the *Brims* case "should be deflated to its position as one of a line of cases uncritically condemning refusal to work on non-union products delivered in interstate commerce" —a position no longer tenable in the form stated—and that "when the union is permitted to act alone, an agreement with employers should not automatically add the condemnable virus." Tunks, *A New Federal Charter for Trade Unionism*, 41 Col. L. Rev. 969, 1012.[11] This distinction seems to us the logical deduction to be made from the present state of Supreme Court decisions, and to be consistent with the statutes upon which the Court relies, and which do not in terms exclude business-labor combinations, but, as we have seen, do extend the inclusive labor dispute to include employment interests not themselves primarily engaged in a controversy as to terms and conditions of employment. On this basis it would follow that here the activities which cannot be forbidden to Local 3 acting by itself are not to be interdicted because other groups join with them to the same end.

---

after trial. Upon appeal the convictions were sustained (except as to three individuals), the court holding the agreement one not to secure any legitimate advance of the laborer's interest, but to extort a "capital levy on the home builder" and a "monopoly price tribute from the consumer" and, relying upon the *Brims* case, to the effect that labor and the employer may not agree to give the latter a monopoly price-fixing contract and thereafter "split the take." Hence the history, the scope, and the purpose of the fixed written agreement, as stated by the court—all tend to differentiate that case from the present (compare the *nol. prossing* of indictments, as stated in note 1, *supra*), while the present issue of framing an injunction of fixed regulation of future union activities differs markedly from that of finding evidence to sustain a jury's verdict of guilt. Nevertheless, with deference one may question the present extent of the *Brims* doctrine as here restated, or the view that a labor dispute loses its character as such as soon as a collective bargain is made. Compare the views of the same district judge in the *Bay Area Painters* case, *supra*.

11. For like comments, see note 10, *supra*.

Appendix B

That the present state of the authorities is such as to leave the harshness of the economic struggle to bear with unusual weight upon the consuming public has been the conclusion of commentators who have urged legislative action to check some of the abuses of power which exist.[12] But the making of ground rules for business competition is difficult in any case, as shown by current discussions of such matters as patent monopolies and the issue of compulsory licensing to prevent the use of patents to retard new inventions; and the problems are immeasurably increased with the addition of the explosive elements of attempted regulation of organized labor. Indeed, advocates of legislative reform seem not agreed as to whether it should take the course of external controls of conduct towards third persons or internal regulation of union affairs. The determination of such questions of policy is, of course, no proper function of the courts; we mention the matter to indicate that we are not unaware of the disturbing consequences to the parties involved of judicial non-interference which, however, in the light of experience seems likely to be less costly to stable social institutions than judicial attempts to resolve these problems without the aid of, if not contrary to, legislative direction.

Judgment reversed and action dismissed.

12. As in Gregory, *op. cit. supra*, note 4, 10 U. Chi. L. Rev. 177; Teller, *op. cit. supra*, note 4; 9 Geo. Wash. L. Rev. 948-961; 41 Col. L. Rev. 529, 532; 49 Yale L. J. 518, 534; and the series of Ross Prize Essays in 28 A. B. A. J. 385, 471, 531, 594. But *cf.* Tunks, *op. cit. supra*, note 4; Shulman, *Labor and the Anti-Trust Laws*, 34 Ill. L. Rev. 769.

SWAN, *Circuit Judge*, dissenting:

I do not read the Supreme Court cases as requiring us to hold that none of the conduct of the appellants, as found by the special master and the district court, can be deemed a violation of the anti-trust laws. The members of a labor union are privileged to agree among themselves upon a boycott, although the effect of it may be to restrain interstate commerce, when the purpose of their boycott is to make work for themselves, or improve working conditions or strengthen their union as against a competing union; but I do not think it has yet been held that they may agree with their employers to enforce a boycott for the very purpose of restraining commerce and increasing the price of articles manufactured or dealt in by their employers within a local market area. As I read the findings of fact the case at bar falls within the latter classification. Among the findings supporting this view the following may be quoted:

"353. The combination and conspiracy hereinbefore described was intended to and did give the local union manufacturers power to control the market price of their products as a result of their monopoly and was intended to and did give the union contractors exclusive purchasing rights to all electrical equipment for installation and contracts involving larger sums of money wherewith to add to their profits."

"359. The purpose of the defendants and those participating with them, in conducting the boycott is, in so far as is practicable, to exclude from the New York City market all electrical equipment unless it is manufactured or built by members of Local No. 3, employed by either local union manufacturers in the

factory or by local union contractors on the job where the equipment is to be installed."

"366. All the acts of the defendants and those acting in concert with them were calculated and intended to prevent and destroy all interstate commerce in electrical equipment of such kinds as can be and are manufactured by local union manufacturers or built on the job by local union contractors in order thereby to secure a monopoly for the members of Local No. 3 and for their employers, the union electrical contractors and the union electrical manufacturers, of the work of manufacturing in whole or in part such types of electrical equipment to be used in the City of New York."

"368. A desire or intention by the conspirators to bring about any modification of the standards or terms of wages, hours, or working conditions, or employment relations maintained by the plaintiffs, or any of them, in any of their factories outside the Metropolitan Area, did not in any way motivate the conspirators in boycotting the plaintiffs' products."

In my opinion the facts found by the trial court make applicable the principle of *United States* v. *Brims*, 272 U. S. 549 involving a conspiracy of mill work manufacturers, building contractors and a carpenters' union. Neither the Clayton Act nor the Norris-LaGuardia Act has rendered that case obsolete, as recent opinions of the Supreme Court plainly show. See *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 501; *United States* v. *Hutcheson*, 312 U. S. 219, 232. The eighth circuit has just applied the rule of *United States* v. *Brims* to facts very similar to those of the case at bar. *Lumber Products Assn.* v. *United States*, decided August 23, 1944. I think that we should likewise apply it. Until the contrary shall be au-

thoritatively determined, I am unwilling to believe that the congressional legislation exempting labor unions from injunctions was intended to go so far as to permit employers and employees to combine to do what neither the City of New York by municipal ordinance nor the State of New York by legislative fiat could lawfully do, namely, exclude manufactured articles from the local market merely because they were manufactured outside the state. I agree with my colleagues that the injunction was granted in term too broad, but I cannot agree that no injunction whatever is permissible or that the prayer for a declaratory judgment should be denied. I therefore dissent from dismissal of the complaint.